92-1376

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

NICKERSON AMERICAN PLANT BREEDERS INC.,

Petitioner,

v.

LATHAM SEED CO., ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented by this petition are closely related to the questions this Court has under review in *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W.Va.), *cert. granted*, 61 U.S.L.W. 3400 (U.S. November 30, 1992) (No. 92-479). The questions presented in this case are:

1. Whether post-verdict review of the punitive damage awards under "shocks the conscience" and "passion and prejudice" standards satisfied the due process requirements of this Court's decision in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991).

2. Whether the award of ten million dollars in punitive damages against NAPB violated its due process rights where the trial and appellate courts in their post-verdict review justified the awards solely in terms of claims on which NAPB had prevailed at trial.

3. Whether NAPB's due process rights were violated by jury instructions that allowed the jury to assess punitive damages based on the wealth of Royal Dutch/Shell, a remote parent company of NAPB.

4. Whether the excessive and disproportionate nature of the punitive damage awards constituted a deprivation of NAPB's property without due process of law.

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 29.1 of the Rules of this Court, NAPB states that it is a wholly owned subsidiary of Shell Oil Company, a Delaware corporation, and that all of the common stock of Shell Oil Company is owned by Shell Petroleum Inc., a Delaware corporation.

The voting shares of Shell Petroleum Inc. are directly or indirectly owned sixty percent by Royal Dutch Petroleum Company, The Hague, The Netherlands, and forty percent by The "Shell" Transport and Trading Company, p.l.c., London, England.

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PETITION FOR A WRIT OF CERTIORARI

Nickerson American Plant Breeders Inc. ("NAPB") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1A-19A) is reported at 978 F.2d 1493. The ruling of the district court on petitioner's motion for judgment notwithstanding the verdict, or in the alternative for a new trial (App., *infra*, 20A-35A), is not reported. The ruling of

the district court following remand for further consideration of the punitive damage awards (App., *infra*, 36A-51A) is not reported. The ruling of the court of appeals on the petition for rehearing and suggestion for rehearing *en banc* (App., *infra*, 52A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1992. The petition for rehearing and suggestion for rehearing *en banc* were denied on December 22, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> . . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law

STATEMENT

This case exemplifies the growing trend to convert relatively minor commercial disputes into multimillion dollar punitive damage cases, resembling in this respect *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va.), *cert. granted*, 61 U.S.L.W. 3400 (U.S. November 30, 1992) (No. 92-479). Although most of the ten plaintiffs' claims were either dismissed by the court or rejected by the jury, and although the compensatory damages ultimately awarded by the jury ranged from a low of $11,139 to a high of $475,776, each plaintiff received an identical one million dollar punitive damage award. Even disregarding the fact that the compensatory awards were based on breach of contract and not on any tortious conduct, the punitive awards ran as high as ninety times actual damages.

As in *TXO*, the punitive damages award was affirmed without the procedural safeguards that this Court found to be crucial in *Haslip*. In upholding the awards, the district court and the court of appeals concluded that this Court's decision in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), had left unaffected the deferential "shock the conscience" and "passion and prejudice" tests for review of punitive damage awards. In conducting their review, moreover, they failed to consider the single tort for which NAPB had been found liable, relying instead on claims that had been resolved in NAPB's favor. They also rejected or refused to consider NAPB's arguments that the jury instructions impermissibly allowed punitive damages to be assessed on the basis of the wealth of Royal Dutch/Shell, a remote shareholder

of NAPB's parent company, and that the awards were excessive and disproportionate to actual damages.

1. NAPB, a developer of seed products protected by the Plant Variety Protection Act, 7 U.S.C. § 2321-2583, licensed to plaintiffs and other "associates" the right to sell proprietary soybean varieties, and to use its trade name "Agripro" in doing so. The associates grew the licensed varieties from foundation seed provided each year by NAPB, and sold the resulting crop to seed dealers or farmers. NAPB also had a separate sales organization that sold soybean seed directly to dealers under another brand name. The associate licenses were embodied in written contracts, all of which expired on March 1, 1985, and all of which included the provision that they conferred "no exclusive rights of any kind."

Warren Melles became president of NAPB in April 1983 and shortly thereafter commissioned a study of NAPB's marketing system. The study concluded later that year with the recommendation that NAPB adopt the Agripro brand name for all its products. Mr. Melles accepted that recommendation and presented it to NAPB's board of directors with the further recommendation that NAPB integrate its soybean sales efforts and discontinue the associate system when the contracts expired in 1985. The board approved Mr. Melles's recommendation in all relevant respects on March 14, 1984. NAPB announced the decision to the associates, the general public and its own sales force in July 1984. The brand change took effect with the beginning of the marketing season in the fall of 1984; the associate system ended with

the expiration of the associate contracts on March 1, 1985.[1]

2. This action was commenced in September 1985. Although written provisions of the associate contracts stated that they were non-exclusive and that they expired on March 1, 1985, plaintiffs claimed that oral understandings with NAPB's prior management had made them exclusive (prohibiting NAPB from using the Agripro brand for direct sales) and of indefinite duration. Plaintiffs also alleged breaches of other oral contracts and asserted several theories of recovery sounding in tort, including fraud, breach of fiduciary duty and tortious interference with contractual relations.[2]

The trial court dismissed the breach of fiduciary duty claims after the opening statements. After a nine-week trial, plaintiffs voluntarily dismissed their claims for tortious interference with contractual relations. Prior to submitting the case to the jury, the court dismissed the claim that the contracts were of indefinite duration, holding

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[1] Because of the overlapping annual cycles of soybean seed growing, harvesting and selling, NAPB gave the associates the option of extending their contract rights through the 1985-86 season, enabling them to grow and sell seed crops from foundation seed purchased in the winter of 1985. A number of the associates, including five of the ten plaintiffs, exercised that option.

[2] Federal jurisdiction in the district court was based on 28 U.S.C. § 1331. The district court dismissed the federal claims (under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961-1968) for failure to state a claim upon which relief could be granted, but elected to exercise continuing pendent jurisdiction over the remaining state law tort and contract claims. App., *infra*, 23A-24A.

that they were "clear and unambiguous concerning [their] term and termination" (May 7 Order at 2), but allowed the jury to consider whether NAPB nevertheless had orally promised to renew the contracts for an additional three-year term (*Id.* at 3).

Four breach of contract claims and four fraud claims were submitted to the jury in special interrogatories.[3] The court instructed the jury that it could award punitive damages if it found for plaintiffs on any of the fraud claims and if it also found NAPB's actions to be "reckless, wanton or malicious", which the court defined as including "the intentional of a [sic] wrongful act without just cause or excuse." Instruction 54. As to the nine plaintiffs whose claims were submitted under Iowa, Indiana and Ohio law, the jury was instructed that the purpose of punitive damages was "by way of punishment . . . to restrain and deter [NAPB], and others, from committing similar acts in the future" and that it should assess such

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[3] The special interrogatories asked the jury to decide (1) whether NAPB had breached contracts (a) to supply its "best" soybean varieties to the associates, (b) to give the associates the exclusive right to sell Agripro soybeans, (c) to "disclose all relevant matters" and (d) to renew the contracts for an additional three-year term beyond their 1985 expiration date; and (2) whether NAPB had committed fraud by (a) misrepresenting that its "best" soybean varieties would be marketed only through the associates, (b) misrepresenting that the associate contracts "would be automatically and continually renewed", (c) "conceal[ing] its intention to terminate the associates and to market Agripro brand soybeans in competition with them" and (d) "conceal[ing] its use of confidential information from the associates to prepare for direct sales in competition with the associates."

punitive damages as would "punish and discourage like conduct by [NAPB] in view of its financial condition." *Id.* As to the tenth plaintiff, however, the jury was instructed that "[s]uch is not the law" because under Michigan law "exemplary damages are not to be awarded as punishment . . . [but] only to compensate for injuries not capable of precise computation." *Id.*

Although the jury was instructed that the amount of punitive damages should be determined in part by NAPB's "financial condition", it had no such evidence before it. At the direction of the court during trial, NAPB had given plaintiffs a current financial statement showing its net worth to be approximately $48 million. When the court denied plaintiffs' request for additional discovery on the subject of NAPB's wealth, plaintiffs decided not to place the financial statement in evidence, and instead urged the jury to assess punitive damages based on the wealth of Royal Dutch/Shell, NAPB's remote parent company. They argued that "you people have a pretty good handle from the testimony . . . what kind of multinational companies we deal with in this case, and you can make the [punitive damages] decision on that" (Argument Tr. 232) and that in assessing punitive damages the jury should consider "How deep is Shell's pocket?" (Argument Tr. 71).

The jury found in plaintiffs' favor on two of the contract claims: (1) that oral statements by NAPB's prior management had made the associate contracts exclusive and (2) that by withholding its announcement of the marketing changes until July 1984 NAPB had breached

oral contracts to "disclose all relevant matters".[4] It found for plaintiffs on only one of the four fraud claims: that by not announcing the marketing changes until July 1984 NAPB had "fraudulently concealed its intention" to make those changes.

Prior to this case, no reported case in any of the relevant states had imposed fraud liability for concealment of intention in the context of an arms-length business relationship. In addition, the evidence showed affirmatively that plaintiffs had suffered no injury as a result of NAPB's "concealment" of its intention in this case. Plaintiffs did nothing between March and July 1984 that could have been affected by knowledge of NAPB's decision. The *only* thing they did with respect to Agripro, in fact, was plant the seed they had bought earlier that year, and they have never claimed that planting that seed caused them any injury. To the contrary, their own evidence showed that they made substantial profits on their Agripro crops that year: their complaint was not that they had grown and sold Agripro in 1984 but that they were unable to continue growing and selling Agripro in future years.

Of the claims on which plaintiffs offered evidence of actual damage, the only one on which they prevailed was their contract claim to exclusive rights. Because NAPB was found to have breached that alleged contract term for only one marketing season, the jury's compensatory damage awards were a small fraction of the amounts plaintiffs

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[4] The jury also found in favor of Coomer Seed Co. on the claim that it was entitled to one three-year renewal of its contract, but rejected that claim as to every other plaintiff.

had sought, ranging from a high of $475,776 to a low of $11,139.[5] Based on the single successful tort claim, however – that NAPB had "fraudulently concealed its intention" by announcing its marketing changes in July rather than March – the jury made identical one million dollar punitive damage awards to each of the ten plaintiffs.

3. The district court denied NAPB's motion for judgment notwithstanding the verdict, or in the alternative for a new trial. It upheld the punitive damage awards in their entirety, applying the following test to all ten awards:

> Although such an award appears in some aspects [sic] overly generous, the court cannot say that the award shocks its conscience. Nor is it so excessive that it demonstrates bias, passion, prejudice, corruption, or other improper motives or causes.

App., *infra*, 30A.

Following remand by the court of appeals for further consideration of the punitive damage awards in light of *Haslip*, the district court reaffirmed the awards, again applying the state law test it had applied in denying the post-trial motions. Although it recognized it was "much broader" than the test approved in *Haslip*, the court held it "imposes a sufficiently definite and meaningful constraint on the fact finders to satisfy due process." App., *infra*, 50A. The district court based its holding in part on its conclusion that application of the Alabama procedures

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[5] Coomer Seeds' award ($71,280) also included damages for breach of the alleged oral contract to renew its contract for an additional three years. *See supra* note 4.

to this case would lead to the same result. Both in reaching that conclusion and in applying the "shocks [the] conscience" and "passion [and] prejudice" tests, however, the court failed to conduct any review in light of the conduct the jury had found to be tortious. Instead, it focused on (1) NAPB's discontinuation of the associate system, which the court had ruled during trial was within NAPB's rights under the contracts and (2) NAPB's alleged use of confidential information obtained from the associates to prepare for direct sales in competition with them, a claim that had been submitted to the jury but upon which NAPB had prevailed. App., *infra*, 39A-49A. The district court also rejected NAPB's arguments that (1) the jury should not have been instructed to consider NAPB's financial condition, (2) the punitive damage awards were excessive because they amounted to more than twenty percent of NAPB's net worth and (3) the punitive damage awards had no "understandable relationship to compensatory damages" where the ratios of punitive to compensatory awards ranged from 2:1 to 90:1.[6] App., *infra*, 31A-33A, 41A.

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[6] These ratios are of punitive damages to *total* compensatory damages, including those for breach of contract. Although the jury did not separately specify damages related to the breach of contract and fraud claims, the fact that no damages were proved for the single fraud claim on which plaintiffs prevailed indicates that the compensatory awards were mostly if not entirely related to the finding that NAPB had breached the oral "exclusive" term of the associate contracts. The ratios of punitive damages to compensatory *tort* damages, therefore, are much higher than the 2:1 to 90:1 ratios of punitive damages to total compensatory damages.

4. The court of appeals affirmed, rejecting all of NAPB's due process arguments. It rejected NAPB's argument that the district court had failed to conduct a meaningful post-verdict review when it applied the "shocks [the] conscience" and "passion [and] prejudice" tests that this Court had specifically distinguished, and impliedly disapproved, in *Haslip*, 113 L. Ed. 2d at 22 n.10. While it agreed that the standards applied by the district court were "less stringent" than those approved by this Court in *Haslip*, it denied "that the difference results in a due process violation." App., *infra*, 17A. The court relied on this Court's affirmance of punitive damage awards reviewed under the same broad standards in *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), and *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71 (1988), App., *infra*, 16A, even though this Court had refused to reach the due process issue in both of those cases.

The court of appeals, like the district court, failed to conduct any post-verdict review of the punitive damage awards on the basis of the conduct the jury had found to be tortious. It relied instead on evidence offered in support of the claim that NAPB had "concealed its use of confidential information from the associates", although the jury had declined to accept that evidence at trial, and on non-existent "testimony in the record that [NAPB] realized approximately $10 million from discontinuing the associate program", although the district court and the jury had concluded, in rulings unchallenged on appeal, that the discontinuation of the associate program was lawful. App., *infra*, 14A.[7]

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[7] The court of appeals' statement that NAPB realized approximately $10 million from discontinuing the associate sys-

The court of appeals refused to consider NAPB's argument that the award of punitive damages on the basis of its parent company's wealth violated due process, agreeing with the district court that NAPB had waived that argument by failing to place its own financial statement in evidence. App., *infra*, 13A. It also rejected the argument that the punitive damage awards failed to bear an understandable relationship to compensatory damages, justifying the wide disparity in ratios by asserting that "although each plaintiff recovered different amounts of actual damages . . . each plaintiff suffered from the same fraudulent conduct on [NAPB's] part." App., *infra*, 14A.

REASONS FOR GRANTING THE PETITION

The decisions below denied NAPB any meaningful post-verdict review of the punitive damage awards; they upheld awards that are grossly excessive in light of NAPB's conduct and bear no understandable relationship to compensatory damages; and they allowed punitive damages to be awarded on the basis of the "deep pocket" of NAPB's remote parent company. They are in conflict with this Court's decision in *Haslip* and with other decisions applying due process principles to punitive damage

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tem, like the similar statement by the district court (App., *infra*, 42A), was made without citation and is not supported by the record. Even apart from the fact that NAPB was entirely within its rights in discontinuing the associate program, there is no evidence that it realized *any* gain, let alone $10 million, from doing so.

awards. As this Court recognized in granting the petition for a writ of certiorari in *TXO*, its review is necessary to resolve those conflicts and to ensure that defendants in punitive damage cases are afforded the protections of due process.[8]

1. In *Haslip*, this Court emphasized the importance of post-verdict review of punitive damage awards as an element of due process. The court of appeals' decision in this case nevertheless approved the district court's application of the highly subjective, standard-free "shocks [the] conscience" and "passion [and] prejudice" tests that *Haslip* had expressly distinguished from the Alabama post-verdict review system. The court of appeals held:

> We reject [NAPB's] contention that a "passion and prejudice" standard of review cannot satisfy constitutional due process requirements after

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[8] Because this Court's decision in *TXO* will be of paramount importance in resolving the issues presented in this case, the Court may wish to defer action on this petition pending its decision in that case. This would be consistent with the practice it followed in *Haslip*. After that decision was announced, the Court granted at least twelve petitions in cases raising due process challenges to punitive damage awards and remanded the cases for further consideration in light of *Haslip*. *Clayton Brokerage Co. v. Jordan*, 111 S. Ct. 1298 (1991); *Reserve Life Ins. Co. v. Eichenseer*, 111 S. Ct. 1298 (1991); *Hospital Authority v. Jones*, 111 S. Ct. 1298 (1991); *Church of Scientology v. Wollersheim*, 111 S. Ct. 1298 (1991); *International Society of Krishna Consciousness v. George*, 111 S. Ct. 1299 (1991); *Pacific Lighting Corp. v. MGW, Inc.*, 111 S. Ct. 1299 (1991); *Portec, Inc. v. The Post Office*, 111 S. Ct. 1299 (1991); *InterContinental Life Ins. Co. v. Lindblom*, 111 S. Ct. 1575 (1991); *AMCA Intl. Finance Co. v. Hilgedick*, 111 S. Ct. 1614 (1991); *Southern Life and Health Ins. Co. v. Turner*, 111 S. Ct. 1678 (1991); *Fleming Landfill, Inc. v. Garnes*, 111 S.Ct. 2882 (1991).

> *Haslip*. . . . We agree with [NAPB] that Indiana, Ohio, Michigan, and Iowa have less stringent procedures for reviewing punitive damage awards than does Alabama. We cannot agree, however, that the difference results in a due process violation.

App., *infra*, 17A.

Contrary to the court of appeals' summary dismissal of NAPB's argument, *Haslip* raises a serious doubt that review under the "passion and prejudice" test affords due process. In upholding the Alabama system in *Haslip*, this Court noted that the "detailed substantive standards" applied by the Alabama courts distinguished that system from the far less rigorous systems employed in Vermont and Mississippi, which some Justices had criticized in *Browning-Ferris* and *Bankers Life*:

> This, we feel, distinguishes Alabama's system from the Vermont and Mississippi schemes about which Justices expressed concern in *Browning-Ferris* and in *Bankers Life*. In those respective schemes, an amount awarded would be set aside only if it was 'manifestly and grossly excessive' . . . or would be considered excessive only when 'it evinces *passion, bias, and prejudice* on the part of the jury so as to *shock the conscience.*'

Haslip, 113 L.Ed.2d at 22 & n. 10 (emphasis added).

The test applied by the district court and upheld by the court of appeals in this case tracks the Vermont and Mississippi tests almost exactly. The district court upheld the $10 million punitive damage award, notwithstanding that it appeared "overly generous", because it "cannot

say that the award *shocks its conscience*" or that it is "so excessive that it demonstrates *bias, passion, prejudice*, corruption or other improper motives or causes." App., *infra*, 30A (emphasis added). The district court's test, therefore, cannot avoid this Court's implicit disapproval of the Vermont and Mississippi tests in *Haslip*.

The court of appeals failed to come to grips with this question. Instead, it relied on *Browning-Ferris* and *Bankers Life* themselves, stating that "the Supreme Court did not reverse, on due process grounds or otherwise, the award of punitive damages in either of those cases" and that "in *Haslip* the Court did not overrule either case." App., *infra*, 16A. Thus it missed the point of all three cases. In both *Browning-Ferris* and *Bankers Life*, this Court declined to consider the due process question because it had not been adequately preserved for review. *Browning-Ferris*, 492 U.S. at 277; *Bankers Life*, 486 U.S. at 77. *Haslip* is the only case in which this Court has conducted a due process analysis of punitive damage awards, and it upheld the Alabama system because it required the application of "detailed substantive standards" which the Court specifically noted were absent from the Vermont and Mississippi schemes, and which are also absent from the schemes applied in this case. This Court has thus clearly indicated that the Vermont and Mississippi tests – and by extension the test applied by the lower courts in this case – are constitutionally insufficient.

The court of appeals' decision is typical of many decisions in the lower courts since *Haslip* that have treated that case as having imposed no meaningful due process limitations on the award of punitive damages.

Because in *Haslip* the Court affirmed the award of punitive damages, a disconcerting number of courts have treated it as a license to hold that the vague standards and deferential review procedures prevailing in most states prior to *Haslip* remain unaffected.[9] Other courts, adopting a reading of *Haslip* more in line with its manifest intent, have rejected the old "shock the conscience" and "passion and prejudice" tests in favor of tests requiring the application of more objective criteria.[10]

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[9] *E.g., Robertson Oil Co. v. Phillips Petroleum Co.*, No. 91-3717, 1992 U.S.App. LEXIS 30167 (8th Cir. 1992) ("shock the conscience" standard of review held adequate under *Haslip*; $8 million in punitive damages affirmed); *Mason v. Texaco Inc.*, 948 F.2d 1546 (10th Cir. 1991) ("shock the conscience" standard applied to reduce punitive damage award from $25 million to $12.5 million); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991) ("passion and prejudice" review held adequate; $6.1 million punitive damages award affirmed); *Burke v. Deere & Co.*, 780 F. Supp. 1225, 1238 (S.D. Iowa 1991) (punitive damages of $50 million upheld under "passion and prejudice" review but nevertheless held "excessive" and reduced to $28 million); *Coyne v. Allstate Ins. Co.*, 771 F. Supp. 673 (E.D. Pa. 1991) (*Haslip* held satisfied by trial court's discretionary review without guidelines); *Wolf v. Goodyear Tire & Rubber Co.*, 808 S.W.2d 868 (Mo. App. 1991) (review limited to whether jury verdict "reveal[s] improper motives or a clear absence of the honest exercise of judgment" held adequate under *Haslip*).

[10] *E.g., Johnson v. Hugo's Skateway*, 949 F.2d 1338 (4th Cir. 1992) ("There can be little doubt that the Virginia standard is far more analogous to the schemes rejected by the *Haslip* Court in footnote 10 than they are to the Alabama scheme"); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901-02 (Tenn. 1992) (adopting a new procedure requiring bifurcated trial and detailed analysis of objective factors similar to those approved in *Haslip*); *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W.Va. 1991) (adopting new criteria for jury instructions and additional factors to be

That the lower courts have adopted such widely divergent views of the meaning of *Haslip* demonstrates in itself that further guidance from this Court is necessary. As this case illustrates, moreover, summary post-verdict review under the "shocks the conscience" and "passion and prejudice" test – applied in this case as the law of four states and in *Browning-Ferris* and *Bankers Life* as the law of two others – is far more widespread than review under "detailed substantive standards" such as those of the Alabama system. This case provides an ideal vehicle for deciding whether that test satisfies the *Haslip* requirement that punitive damage awards be subjected to "meaningful and adequate review" at both the trial and appellate levels.

2. In *Haslip* this Court noted that, in conducting its post-verdict review of punitive damage awards, Alabama applied "detailed substantive standards" to the "wrongful conduct" found to have occurred. 111 S. Ct. at 1045. By applying "the full panoply of Alabama's procedural protections", *id.* at 1046, the Alabama courts ensured that punitive damages would be imposed only after a "meaningful individualized assessment of appropriate deterrence and retribution." *Id.* at 1044.

Central to the Court's analysis in *Haslip* was the concern that punitive damage awards be judged "in light of their purpose to punish what has occurred and to deter its repetition." *Id.* at 1045. Thus the Alabama criteria

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considered by the court in post-verdict review); *Gamble v. Stevenson*, 406 S.E.2d 350 (S.C. 1991) (imposing new procedures in light of *Haslip*, including post-trial review considering objective factors).

included assessment of the "harm likely to result from the defendant's conduct", the "degree of reprehensibility of the defendant's conduct" and the "profitability to the defendant of the wrongful conduct", *id.*, referring in each case to the conduct that formed the basis for the award of punitive damages. Whatever standards courts may apply in reviewing punitive damage awards, it is axiomatic that they must apply them to the tortious conduct for which the defendant has been found liable, and not to claims on which the defendant has prevailed.

If the punitive damage awards in this case are to be justified, therefore, they must be justified on the basis of the only tortious conduct NAPB was found to have committed: its delay from March to July 1984 in informing plaintiffs of its decision to change marketing systems. Neither the district court nor the court of appeals, however, even considered that conduct in reviewing the punitive damage awards. Instead, they justified the awards by reference to claims that had been resolved in NAPB's *favor*. Both courts treated NAPB's discontinuation of the associate system as conduct justifying punitive damages, despite the fact that NAPB's right to discontinue the associate system when the contracts expired had been firmly established and was no longer in dispute;[11] and

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[11] Even if plaintiffs had prevailed on their claim that NAPB had a contractual obligation to continue the associate system, that claim could not have been used to justify the punitive damage awards. Applicable state law does not allow punitive damages to be awarded on breach of contract claims. *Canada Dry Corp. v. Nehi Beverage Co.*, 723 F.2d 512, 524 (7th Cir. 1983) (Indiana law); *Digital & Analog Design Corp. v. North Supply Co.*, 44 Ohio St. 3d 36, 45-46, 540 N.E.2d 1358, 1367 (1989); *Berryhill v.*

they relied on evidence offered in support of the confidential information claim, even though NAPB had not been held liable on that claim.

It is entirely appropriate to treat as established for punitive damages purposes the claims upon which plaintiffs prevailed at trial. It is highly inappropriate, however, to treat as established the claims upon which the defendant prevailed. The use by the district court and the court of appeals of evidence rejected by the jury is a clear violation of NAPB's right to review of the punitive damage awards in light of "the conduct in question." *Haslip*, 111 S. Ct. at 1046.

The jury's rejection of all the tort claims that could have resulted in significant injury to the plaintiffs should have been a powerful factor in favor of the mitigation or elimination of any punitive damages award. At the very least, those rejected claims and the discredited evidence offered in support of them should not have been used *against* NAPB to justify punitive damages. If due process means anything, surely it means that a defendant may not be punished for conduct for which it has been tried and found *not* guilty.[12]

Hatt, 428 N.W.2d 647, 656 (Iowa 1988); *Kewin v. Massachusetts Mut. Life Ins. Co.*, 409 Mich. 401, 405, 295 N.W.2d 50, 55 (1980). This is the general rule. 25 C.J.S. *Damages* § 120 (1966).

[12] The court of appeals itself recognized this principle in *Robertson Oil Co. v. Phillips Petroleum Co.*, 871 F.2d 1368 (8th Cir. 1989), in which it reversed and remanded a general punitive damages verdict because it could not identify the particular conduct upon which that verdict was based. Its holding in that case that "the conduct . . . relevant to an award of punitive damages necessarily differs according to the various theories of

3. This Court approved the jury instructions in *Haslip* in the context of Alabama's overall system for punitive damages, which included careful post-verdict review by the trial and appellate courts acting as a "definite and meaningful constraint on the discretion of Alabama fact finders." 111 S. Ct. at 1045. Those instructions did not direct the jury to consider the defendant's wealth in assessing punitive damages; indeed, "[a]ny evidence of Pacific Mutual's wealth was excluded from the trial in accordance with Alabama law." *Id.* at 1044. Thus "Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Id.* at 1045.

The jury instructions in this case, in contrast, specifically directed the jury to consider the depth of NAPB's pocket in assessing punitive damages. In determining the amount of punitive damages to be awarded to each of the nine plaintiffs for which "deterrence" punitive damages could be awarded, the jury was instructed to consider, in addition to "[NAPB's] conduct" and "[t]he [plaintiff's] actual damages", "[t]he amount of punitive damages which will punish and discourage like conduct by [NAPB] in view of its financial condition." Instruction 54.

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liability on which the jury based its verdict", *id.* at 1376, cannot be reconciled with its reliance in this case on theories of liability other than those on which NAPB was found liable. Although the *Robertson* holding was based on state law, the principle it states applies with equal force to the due process requirement that punitive damage awards be reviewed in light of the defendant's wrongful conduct.

The direction to the jury to consider NAPB's financial condition in assessing punitive damages was particularly inappropriate in this case because there was *no* evidence of NAPB's financial condition before the jury. Plaintiffs' counsel had decided, after receiving NAPB's current financial statement, not to present any such evidence, and instead to argue to the jury that punitive damages should be based on the wealth of the "kind of multi-national companies we deal with in this case" (Argument Tr. 232) and that it should consider "How deep is Shell's pocket?" (Argument Tr. 71).

Plaintiffs' decision not to offer evidence of NAPB's financial condition removed any possible basis for instructing the jury to consider it. Without any such evidence before it, moreover, the jury had no alternative but to follow plaintiffs' counsel's suggestion that punitive damages be assessed based on the depth of "Shell's pocket". Thus the prejudice inherent in focusing the jury on the defendant's wealth was greatly magnified in this case by the absence of evidence to support the instruction and by plaintiffs' counsel's intentional misdirection of the jury.

It is no answer to say, as the courts below did (App., *infra*, 12A, 31A, 47A), that NAPB could have placed its own financial statement in evidence. Evidence of NAPB's wealth was not relevant to liability or compensatory damages, nor even to whether punitive damages should be awarded, but only to the *amount* of punitive damages. If the only evidence of NAPB's wealth had been offered by NAPB itself, it would have been impossible for NAPB to dispel the inference that it had conceded liability for punitive damages. By complying with the trial court's

order to give its financial information to plaintiffs' counsel, NAPB fully discharged its disclosure obligations regarding its financial condition; it should not have been penalized for *plaintiffs'* failure to submit that information to the jury in support of their request for punitive damages.

The rulings of the courts below not only would allow juries to consider the defendant's wealth; they would effectively require the defendant to supply that element of proof itself or run the risk that the jury may be persuaded simply to imagine how rich the defendant must be. If wealth is a legitimate consideration in assessing punitive damages, at least the burden should be on the plaintiffs to place that information in evidence before the jury is instructed to consider it. *See Adams v. Murakami*, 284 Cal. Rptr. 318, 813 P.2d 1348 (1991) (absence of evidence of defendant's financial condition made it impossible both for the jury to follow the instruction to consider financial condition in awarding punitive damages and for the reviewing court to determine whether the award was excessive; plaintiff's failure to offer such evidence therefore precluded any punitive damages award).

The denial of due process inherent in focusing the jury on the defendant's wealth, aggravated in this case by the absence of any evidence of the defendant's wealth and by plaintiffs' argument that the jury should base its award on the imagined wealth of the multi-national group of companies to which the defendant belonged, was compounded further by the refusal of both the district court and the court of appeals even to consider NAPB's argument that the resulting jury verdict (over twenty percent of NAPB's net worth) was excessive in

light of its financial condition. In *Haslip*, this Court found due process safeguards both in the fact that the jury was not allowed to consider the defendant's wealth, 111 S. Ct. at 1044, and in the fact that the reviewing court was required to do so in its post-verdict review, *id.* at 1045. The lower courts in this case reversed that process, instructing the jury to consider NAPB's financial condition despite the fact that there was no evidence to support such an instruction, and then *refusing* to consider NAPB's financial condition in their post-verdict review *because* there was no such evidence. Thus they replaced the twin safeguards of *Haslip* with a system that combines undue emphasis on the defendant's wealth with the absence of any process for making that determination on a rational basis or subjecting it to judicial review.

4. In *Haslip*, this Court approved the Alabama system for post-verdict review because it "ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." 111 S. Ct. at 1045. Although it did not impose the specifics of the Alabama review system on other states, *Haslip* necessarily stands for the proposition that any state's system comports with due process only to the extent it provides the reasonable assurance of proportionality and understandable relationship that the Alabama system provided in that case.

The system employed by the courts below failed to provide that assurance. Prior to this case, it had never been held that a company has a duty to disclose its future business plans to one with whom it has an arms-length business relationship; recent cases, in fact, had held just

the opposite in almost identical circumstances. *E.g., Cloverdale Equip. Co. v. Simon Aerials, Inc.*, 869 F.2d 934 (6th Cir. 1989) (no duty to disclose plans to terminate distributorship; Michigan law); *Vaughn v. General Foods Corp.*, 797 F.2d 1403 (7th Cir. 1986) (no duty to disclose plans to divest franchisor; Indiana law).[13] Because NAPB had no way of knowing that it would be found to have an obligation to announce its planned marketing changes immediately after they were decided upon, it can hardly be said that the "severity" of its offense warrants a ten million dollar punishment, especially when the four-month delay in the announcement neither threatened nor resulted in any injury. *See supra* p. 8.

Nor do the punitive damage awards in this case satisfy the requirement that they have an understandable relationship to compensatory damages. Ten separate plaintiffs received compensatory damage awards that varied in size by a factor of almost fifty, from a high of just under $500,000 to a low of just over $10,000 – awards, moreover, which relate largely if not entirely to breach of contract, not fraud (*see supra* note 6). Each plaintiff was nevertheless given, on top of its compensatory award, an identical $1 million award of punitive or "exemplary" damages.[14] Even if the compensatory awards could

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[13] Neither the district court nor the court of appeals cited any authority in support of their holding that such a duty exists, nor did either court attempt to distinguish, or even acknowledge, the contrary authority cited by NAPB. App., *infra*, 9A, 28A.

[14] The arbitrary nature of the identical one million dollar awards is perhaps best illustrated by the fact that the jury gave St. Joseph Valley Seed Co., the Michigan plaintiff, the same one

somehow be viewed as related entirely to the fraud claim, the ratios of punitive to compensatory awards would range from 2:1 to 90:1. Neither the district court nor the court of appeals offered any justification for such a wide disparity, other than the statement by the court of appeals that "each plaintiff suffered from the same fraudulent conduct on [NAPB's] part" (App., *infra*, 14A), a statement that does not even address the understandable relationship requirement.[15]

The one million dollar award of "exemplary" damages to St. Joseph Valley Seed Co. under Michigan law provides an extreme example of the absence of any usable

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million dollar bonus award it gave to each of the other plaintiffs. That the jury could reach such a result, despite not only the great disparity in actual damages among the plaintiffs but in St. Joseph Valley's case the wholly different instruction it was given under Michigan law, demonstrates convincingly that it lacked meaningful guidance in assessing punitive damages against any of the plaintiffs.

[15] No other decisions have been found specifically holding that widely varying ratios in the same case either are or are not consistent with *Haslip*'s understandable relationship requirement. Prior to *Haslip*, however, the Eighth Circuit held that a similar requirement of Missouri law was violated in circumstances indistinguishable from this case. The court vacated identical $750,000 punitive damage awards to two plaintiffs injured in the same accident, one of whom had been awarded $15,000 and the other $3,000 in compensatory damages. The court held that the "vast difference between the fifty to one and two-hundred-fifty to one ratios" showed that "the jury did not fashion the punitive damage awards to bear a relation to the injuries inflicted as required by Missouri case law." *Morrissey v. Welsh Co.*, 821 F.2d 1294 (8th Cir. 1987).

standards as well as the disconnection between the punitive damage awards and any legitimate state interests. The trial court instructed the jury as to St. Joseph Valley that "exemplary damages are not to be awarded as punishment . . . [but] only to compensate for injuries not capable of precise computation which are a result of malicious conduct by the defendant and have not otherwise been compensated for." Instruction 54. Since the jury had already been told that it should award as compensatory damages "all injuries and losses caused by [NAPB's] wrongful acts" (Instruction 49) and that "the fact that the precise amount of damage may be difficult to ascertain does not impair [plaintiffs'] right to recover damages" because the jury may "determine the amount of damages by estimation and approximation" (Instruction 50), the instruction to award *additional* compensation "for injuries not capable of precise computation" was simply an invitation to award St. Joseph Valley some additional money for no particular reason.[16] In addition, by directing the jury to *disregard* considerations of punishment and deterrence, it stripped that award of any pretense that it furthered legitimate state goals. *See Haslip*, 111 S. Ct. at 1044, 1045 (Alabama procedures limited jury discretion to the legitimate state goals of punishment and deterrence).

In upholding the punitive damages award in *Haslip* despite the fact that it was more than 4 times the amount

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[16] The inability of the trial court to give any guidance to the jury in this regard is highlighted by the fact that, although St. Joseph Valley at trial had expressly abandoned any claim for damage to its business reputation (Tr. 3216, 3243), the trial court gave that as its only example of the kind of injury that might be compensable by an "exemplary" award.

of compensatory damages and more than 200 times the plaintiff's out-of-pocket loss resulting from the defendant's fraud, this Court noted that "[w]hile [those] monetary comparisons are wide and, indeed, may be close to the line, the award here . . . does not cross the line into the area of constitutional impropriety." 111 S. Ct. at 1046. In this case, the punitive damage awards range up to 90 times the amount of total compensatory damages, even including breach of contract damages. Moreover, because no discernible injury resulted from any tort NAPB committed, the punitive damages are *infinitely* greater than any out-of-pocket loss resulting from NAPB's tortious conduct. In upholding those awards in this case, therefore, the court of appeals failed to heed the teachings of *Haslip* and "cross[ed] the line into the area of constitutional impropriety."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 17, 1993

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2486

LATHAM SEED COMPANY; THE OHIO GRAIN COMPANY, formerly doing business as Ohio Soil Service, Inc.; SCHETTLER SEED FARM, INC., doing business as Diamond Brand Seeds; RUPP SEEDS, INC.; SHOCKNEY SEED SERVICE, INC.; DIENER BROS., INC.; CHARLES O. LAVERTY, doing business as Laverty Seed Farm; COOMER SEEDS, INC.; SETTLEMYRE SEED CO.; ST. JOSEPH VALLEY SEED CO., doing business as M.F.I. Seeds,	*	
Appellees,	*	
v.	*	Appeals from the United States District Court for the Northern District of Iowa.
NICKERSON AMERICAN PLANT BREEDERS, INC., doing business as Agripro Seeds,	*	
Appellant.	*	

No. 90-2550

LATHAM SEED COMPANY; THE OHIO GRAIN COMPANY, formerly doing business as Ohio Soil Service, Inc.; SCHETTLER SEED FARM, INC., doing business as Diamond Brand Seeds; RUPP SEEDS, INC.; SHOCKNEY SEED SERVICE, INC.; DIENER BROS., INC.; CHARLES O. LAVERTY, doing business as Laverty Seed Farm; COOMER SEEDS, INC.; SETTLEMYRE SEED CO.; ST. JOSEPH VALLEY SEED CO., doing business as M.F.I. Seeds,

Appellants,

v.

NICKERSON AMERICAN PLANT BREEDERS, INC., doing business as Agripro Seeds,

Appellee.

Submitted: November 4, 1991

Filed: November 9, 1992

Before LAY,* Chief Judge, WOLLMAN, Circuit Judge, and RONEY,** Circuit Judge.

WOLLMAN, Circuit Judge.

Nickerson American Plant Breeders, Inc. (Nickerson) appeals from the judgment entered by the district court[1] on a verdict against it for fraud and breach of oral contract and for punitive damages. One of the plaintiffs, St. Joseph Valley Seed Company, cross-appeals the denial of prejudgment interest on its exemplary damages award. We affirm the judgment and the punitive damages award and reverse the denial of prejudgment interest.

I.

Agripro, Inc. developed and patented varieties of soybean seeds. It distributed its seed through an "associate" system, in which Agripro sold seed stock to seed companies (the associates), which in turn grew and processed the stock into commercial seed for sale to seed dealers. The dealers then sold that seed to farmers. The

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* The Honorable Donald P. Lay was Chief Judge of the United States Court of Appeals for the Eighth Circuit at the time this case was submitted and took senior status on January 7, 1992, before the opinion was filed.

** The HONORABLE PAUL H. RONEY, Senior Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

[1] The Honorable William C. Hanson, Senior United States District Judge for the Northern District of Iowa.

associates paid royalties to Agripro on their sales of commercial seed.

Nickerson purchased Agripro in 1976 and continued the associate system of distribution, using the Agripro name. Nickerson's business director, L.C. Nelson (later its president),[2] visited each associate and assured it that the system would continue as before. Other Nickerson officials assured the associates over the years that the system would continue as before. Nickerson's *Statement of Agripro Associate Policies* stated that Nickerson would "keep the associates informed on all matters relevant to the Associate program."

In 1982, Nickerson entered into new three-year contracts with the associates. These contracts gave the associates the right to produce and market Nickerson's soybean varieties using the Agripro name. Each individual contract stated, however, that it gave the associate "no exclusive rights of any kind."

In 1983, Warren Melles became president of Nickerson. He reviewed the company's marketing and distribution strategy and in October recommended to the board of directors that Nickerson terminate the associate program and distribute soybean seed directly through seed dealers. The board approved this recommendation in March 1984, and Nickerson informed the associates of its decision that July. In 1985, Nickerson began selling commercial seed directly to seed dealers in competition with

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[2] Nelson was Nickerson's business manager from 1976 until 1980 and its president from May 1980 until February 1982.

the associates, whose contracts extended through that year.

The plaintiffs – ten associates from Indiana, Michigan, Ohio, and Iowa – filed suit against Nickerson in the fall of 1985. Nickerson counterclaimed for royalties on the associates' 1985 seed sales. The jury awarded the plaintiffs compensatory damages in amounts ranging from $11,139 to $475,776 each, for a total of $1,095,740.[3] If found that Nickerson had fraudulently concealed its decision to discontinue the associate system and that Nickerson had breached oral contracts with the associates by selling Agripro seed in competition with them, by failing to disclose matters relevant to the associate program, and by failing to renew the contract of one associate, Coomer Seeds. The jury awarded $1 million in punitive damages to each of nine associates and $1 million in exemplary damages to St. Joseph Valley Seed Company and found against Nickerson on its counterclaim.

Nickerson appeals. St. Joseph Valley Seed Company cross-appeals, claiming that the district court erroneously refused to award prejudgment interest on its exemplary damages award.

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[3] The jury awarded the following amounts in compensatory damages to the respective plaintiffs: Settlemyre Seed Company, $27,490; Coomer Seeds, Inc., $71,280; St. Joseph Valley Seed Co., d/b/a M.F.I. Seeds, $92,077; Charles O. Laverty, d/b/a/ Laverty Seed Farm, $38,625; Diener Bros., Inc., $87,622; Shockney Seed Service, Inc., $11,139; Rupp Seeds, Inc., $74,230; Schettler Seed Farm, Inc., $74,061; The Ohio Grain Company, f/d/b/a Ohio Soil Service, Inc., $143,440; Latham Seed Company, $475,776.

II.

Nickerson raises several claims of error in disputing its liability for breach of contract and fraud. It claims first that it did not breach its contracts with the associates 1) by selling seed directly to seed dealers, because the contracts with the associates were non-exclusive, 2) by failing to inform the associates of termination of the program, because the contracts were of limited duration and had no notice requirement, or 3) by failing to renew Coomer Seeds' contract, because the contract expired by its own terms. Second, Nickerson claims that it did not commit fraud by failing to inform the associates of relevant matters, because it had no duty to disclose business decisions to the associates and because it did inform the associates that the program would be terminated. Last, Nickerson claims that the district court erred by denying its motion for directed verdict on its counterclaim for royalties.

Nickerson first argues that the contracts with the associates were of limited duration, had no notice requirement, expired by their own terms, and were unambiguously non-exclusive.

With respect to the provision of the contract stating that it gave the associate "no exclusive rights of any kind," several associates testified at trial that they understood this clause to refer only to geographical areas. That is, they believed that although only Agripro associates would be authorized to sell Agripro seed and that Nickerson could authorize others as associates, no associate had the right to exclude another from a territory. This testimony was bolstered by Nelson's testimony that the

clause referred only to geographical exclusivity and that the associates would not have agreed to contracts containing clauses allowing non-associates to sell Agripro seed. Nelson further stated that the exclusivity clause replaced a clause that gave associates the "exclusive right to market" Agripro products. The original clause had been used by some associates to keep other associates out of particular geographic territories; Nickerson wanted to make clear that associates had no right to do so, and substituted the clause in question.

The contracts were silent as to integration. Nelson, who drafted the 1982 contract, testified that the contracts were not intended to be integrated on the issue of exclusivity. Nelson testified further that he intentionally avoided putting any language of integration into the marketing agreements for 1977, 1978, 1979, and 1982, "because no associate would sign it." Tr. at 942. Nelson stated that the associates would have refused to sign any contract containing an integration clause because "there would [have been] no validity then to all the promises I had made and other people in management had made to the associates. . . . " Tr. at 943. Accordingly, the district court instructed the jury that, depending on its findings of fact, the agreements between Nickerson and the associates could consist of both written and oral agreements. We agree with the district court that the exclusivity language of the contracts does not preclude the jury's finding that a separate oral agreement existed that only associates could sell Agripro seed. Consequently, the district court did not err in submitting this issue to the jury.

We next turn to the question whether the jury could reasonably have found that there were additional oral

contracts; that Nickerson had breached its contracts with the associates by selling seed in competition with them, concealing information relevant to the associate program, and not renewing Coomer Seeds' contract; that Nickerson had committed fraud; and that Nickerson's actions relieved the associates of their duty to pay royalties.

We will overturn a jury verdict "only where the evidence is susceptible to no reasonable inferences sustaining it." *Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co.*, 819 F.2d 1471, 1485 (8th Cir. 1987) (*quoting Cashman v. Allied Prod. Corp.*, 761 F.2d 1250, 1253 (8th Cir. 1985)). We consider the evidence in the light most favorable to the verdict, giving the prevailing party the benefit of all reasonable inferences that can be drawn from the evidence and deciding factual disputes in favor of the verdict. *Zoll v. Eastern Allamakee Community School Dist.*, 588 F.2d 246, 250 (8th Cir. 1978).

Applying this deferential standard, we find that the evidence supports the jury's finding that oral agreements existed between Nickerson and the associates and that Nickerson had breached them. The associates and Nelson testified that the contract clause on exclusivity was changed to ensure that associates knew that they could not claim an exclusive territory. Letters from Nickerson to associates and to outsiders state that non-associates were not entitled to sell Agripro seed. Thus, the jury could reasonably have concluded that Nickerson breached its contract by selling soybean seed.

The agreement to keep the associates informed of matters relevant to the associate program was embodied in Nickerson's written policies. Even though Nickerson

eventually revealed its plan to terminate the associate program, it did so long after the plan was adopted and after the 1984 planting had taken place. Thus, the jury reasonably found that Nickerson breached this agreement.

Plaintiff Coomer Seeds, an Indiana corporation, entered into its first contract with Nickerson in 1984, after Melles had recommended that the associate program be discontinued. Coomer Seeds was assured that its association with Nickerson was a "long-term thing" and that it could continue as an associate as long as it did a good job. Thus, the jury could reasonably have concluded that Nickerson had orally agreed to renew the Coomer Seeds contract.[4]

The evidence also supports the jury's finding that Nickerson had committed fraud. Nickerson signed a new associate contract with Coomer Seeds in April 1984, after the decision to terminate the associate program had been made. Termination of the associate program rendered the representations Nickerson had made to the associates over the years untrue. In additon, Nickerson encouraged the associates to order large amounts of seed stock in 1984, all the while knowing that it intended to terminate the program later that year.

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[4] Nickerson's statute of frauds argument is without merit, since the agreement to *renew* the contract is separate from the agreement to distribute Nickerson's seed. The agreement to renew the contract could have been performed within one year, and the statute of frauds thus does not apply. *See Johnson v. Ward*, 265 N.W.2d 746, 747 (Iowa 1978); *Hurd v. Ball*, 143 N.E.2d 458, 464 (Ind. Ct. App. 1957).

Last, Nickerson contends that the district court erred by denying its motion for directed verdict on its counterclaim for royalties. The jury, however, found that Nickerson had breached material conditions of the contracts with the associates and that this breach relieved the associates of their obligation to pay royalties. Whether a party has failed to perform obligations of a contract is a question properly decided by a jury. *See, e.g., Taylor Enter., Inc. v. Clarinda Prod. Credit Ass'n*, 447 N.W.2d 113, 116 (Iowa 1989). Thus, the district court did not err in refusing to set aside the jury's finding against Nickerson on the counterclaim.

III.

Nickerson also argues that the punitive damages awards against it must be set aside. It contends that the awards are defective on state law grounds and that they violate the due process requirements of the fourteenth amendment.

First, Nickerson claims that the trial court should have set aside the punitive damage awards because 1) there were no aggravating circumstances, 2) the jury was given no evidence of Nickerson's financial condition, 3) they jury was instructed that it should consider Nickerson's financial condition if it awarded punitive damages, but was given no evidence of Nickerson's finances, and 4) plaintiffs improperly referred to Nickerson's parent corporation during closing argument.

A jury must be properly instructed with respect to a state's laws. The law on punitive damages in Iowa, Indiana, and Ohio share a similar objective: to punish a

defendant for certain conduct. *See* Iowa Code Ann. § 668A.1 (West 1992) (willful and wanton disregard for the rights of others); Ohio Rev. Code Ann. § 2315.21 (Anderson 1991) (malice, aggravated fraud, oppression, or insult); *Powers v. Gastineau*, 568 N.E.2d 1020, 1024-25 (Ind. Ct. App. 1991) (malice, fraud, gross negligence, or oppression). The law in Michigan is somewhat different. There the purpose of exemplary damages is not to punish a defendant but to make the plaintiff whole for damages, not readily calculated, which are caused by malicious, willful, or wanton conduct, such as "feelings of humiliation, outrage and indignity." *Veselenak v. Smith*, 327 N.W.2d 261, 264 (Mich. 1982). None of these states requires a plaintiff to prove a defendant's financial worth before it can recover punitive damages. *See, e.g., Hibschman Pontiac, Inc. v. Batchelor*, 362 N.E.2d 845, 849 (Ind. 1977); *Hall v. Montgomery Ward & Co.*, 252 N.W.2d 421, 425-26 (Iowa 1977); *Peisner v. Detroit Free Press*, 242 N.W.2d 775, 780 (Mich. Ct. App. 1976). Having carefully examined the punitive damages instruction given to the jury and the laws of these four states, we find that the instruction adequately explained the law and that the jury properly followed the instruction.[5]

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[5] We find no merit in Nickerson's claims that it was deprived of a fair trial by plaintiffs' remarks during voir dire that some plaintiffs had settled with Nickerson and by plaintiffs' remarks during closing arguments that Nickerson had not called certain witnesses. The remarks during voir dire were made while several people were talking, and the district court properly found that they were not harmful. As to the remarks made during closing arguments, the jury received a preliminary instruction from the court to disregard counsel's spontaneous statements. Indeed, Instruction 21 specifically directed the jury

Nickerson complains that the jury was presented no evidence of Nickerson's financial condition. The district court's opinion notes that "[t]he court made it clear after plaintiffs had rested their case that it would be submitting the issue of punitive damages to the jury and defendant had the opportunity to introduce its net worth statement into evidence if it was concerned its relationship with the Royal Dutch/Shell organization would lead the jury to conclude its resources were greater than they were." *Latham Seed Co. v. Nickerson American Plant Breeders, Inc.*, No. C85-3114, slip. op. at 12 (N.D. Iowa Oct. 3, 1991). Nickerson had the opportunity to introduce the evidence of whose lack it complains but refused to do so. *Id.*, slip. op. at 13 n.3. Consequently, we find this claim to be without merit.

Next, Nickerson challenges the punitive damages awards on the grounds that they are excessive in the light of Nickerson's net worth and that they are disproportionate to the compensatory awards. Because assessment of damages is within the jury's sound discretion, we will overturn the award only if it is a plain injustice or a monstrous or shocking result. *Stafford v. Neurological Medicine, Inc.*, 811 F.2d 470, 475 (8th Cir. 1987). The law of the states involved embodies this principle as well. *Ryan v.*

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that a party is not required to call all persons who may have knowledge of the case. Further, in *Tyler v. White*, 811 F.2d 1204, 1206-07 (8th Cir. 1987), we held that there can be no error from such statements without a showing of prejudice affecting a substantial right of the objecting party. The burden of showing prejudice rests on the objecting party. *Id.* at 1207. Nickerson has failed to meet this burden. We presume that the jury followed the court's relevant instructions, and we find no error.

Arneson, 422 N.W.2d 491, 496 (Iowa 1988) (an inflexible ratio that focuses on plaintiff's injury rather than on defendant's wrongdoing fails to accomplish the purpose of punitive damages); *Schlitz Brewing Co. v. Central Beverage Co.*, 359 N.E.2d 566, 581 (Ind. Ct. App. 1977) (to be excessive, a punitive damage award must be the result of passion or prejudice); *Oppenhuizen v. Wennersten*, 139 N.W.2d 765, 770 (Mich. Ct. App. 1966) (exemplary damages must not be oppressive or shock the sense of fair-minded people); *Villella v. Waikem Motors, Inc.*, 543 N.E.2d 464, 469 (Ohio 1989) (low compensatory damages and high punitive damages assessed by a jury are not in and of themselves cause to reverse). The district court specifically found that the punitive damages awards were not so excessive that they shocked its conscience or reflected bias, passion, prejudice or corruption on the part of the jury.

"In reviewing an award of punitive damages, the role of the District Court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The Court of Appeals should then review the District Court's determination under an abuse of discretion standard." *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989). The district court considered Nickerson's objections that the award was excessive in relation to its net worth and disproportionate in relation to the actual damages awarded. The court found that although the jury had little information about Nickerson's net worth, Nickerson itself could have provided the information and failed to do so. Additionally, although

each plaintiff recovered different amounts of actual damages and equal amounts of punitive damages, each plaintiff suffered from the same fraudulent conduct on Nickerson's part. The actual damages varied only because of the size of the associate. There is testimony in the record that Nickerson realized approximately $10 million from discontinuing the associate program.

In addition, the record is replete with examples of conduct on Nickerson's part that support the award of punitive damages. For example, Nickerson used various ruses to procure the associates' dealer lists to facilitate its undisclosed plan to recruit the associates' dealer customers. Nickerson asked its advertising manager, Chuck Stephens, to covertly check associate Schettler Seed Farm's dealer list, despite his ethical reservations. Nickerson management suggested that its salesmen obtain the dealer lists by offering to help boost associate sales through identifying their key dealers. One salesman, Charles Jackson, testified that he lied to obtain access to old advertisements containing dealer names. Another salesman, Russell Welty, expressed reservations about, as he put it, betraying the associates' trust by getting the dealer names. Welty's refusal to betray that trust was one of the reasons that gave rise to his being terminated by Nickerson. Taking all of this into account, we find no abuse of discretion in the district court's assessment that the punitive damages awards were not improper.

Nickerson also challenges the constitutionality of the punitive damages awards. We remanded this issue to the district court after the United States Supreme Court's decision in *Pacific Mutual Life Insurance Company v. Haslip*, 111 S. Ct. 1032 (1991), in which the Court outlined the

due process requirements that must be satisfied as a prerequisite to the award of punitive damages. In *Haslip*, the Court refused to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id.* at 1043. The Court's concern about punitive damage awards centered on unlimited jury discretion and "general concerns of reasonableness and adequate guidance from the court." *Id.*

The Supreme Court set forth three factors which convinced it that Alabama's procedures do not permit the jury to exercise unfettered discretion in awarding punitive damages. First, Alabama courts instruct juries regarding the purpose of punitive damages and explain that their imposition is not compulsory. *Id.* at 1044. Second, Alabama trial courts are required to review punitive awards on the record under a seven-factor test set forth in *Hammond v. City of Gadsen*, 493 So.2d 1374, 1379 (Ala. Sup. Ct. 1986). *Id.* Third, Alabama has a substantive review process that acts as a check on the jury's or trial court's discretion by determining whether punitive damages are reasonably related to the purposes of the award. *Id.* at 1045.

The district court found that the punitive damages awarded to the plaintiffs in this case satisfy the requirements of due process delineated in *Haslip*. The jury instruction at issue is similar to the one given in *Haslip*. In Instruction 54, the district court carefully instructed the

jury on the relevant law of each of the four states concerning the nature and purpose of punitive damages.[6] The court further instructed the jury that the imposition of punitive damages was discretionary and that it should consider the nature and harmfulness of Nickerson's conduct. Following our remand, the district court thoroughly reviewed the punitive damages awards under the standards of each of the four states. Each of the four states has very broad standards, which the district court found had been met. Though not required to do so by the law of any of the four states, the district court then carefully reviewed the punitive damage awards under the seven *Hammond* factors used by Alabama courts. Having completed its review, the district court found that the punitive damages awards were proper.

Nickerson argues that the district court's standard of review mirrors the statutory schemes of Mississippi and Vermont, about which some Justices expressed concern in *Browning-Ferris Industries*, 492 U.S. 257 (1989), and *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988). We cannot agree. First, we observe that the Supreme Court did not reverse, on due process grounds or otherwise, the award of punitive damages in either of those cases. Likewise, in *Haslip* the Court did not overrule either case, but merely distinguished the Vermont and Mississippi statutes as offering less protection than the Alabama scheme.

Nickerson errs in construing the Alabama process approved in *Haslip* as setting a minimum standard for

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[6] For example, the district court's instruction on the applicable Michigan law regarding exemplary damages was some two pages in length. *See* Joint Appendix at 794-95.

acceptable due process in the awarding of punitive damages. *See Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1098 (5th Cir. 1991), *cert. denied sub nom., Celotex Corp. v. Glasscock*, 112 S. Ct. 1778 (1992). *See also Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1384 (5th Cir. 1991) (punitive damages five hundred times the amount of compensatory damages held to be reasonable and not violative of due process). Nickerson mistakenly seizes upon various fragments in the district court's opinion and asserts that the district court applied an overly malleable standard to satisfy the requirements of due process.

We reject Nickerson's contention that a "passion and prejudice" standard of review cannot satisfy constitutional due process requirements after *Haslip*. *See Glasscock v. Armstrong Cork Co.*, 946 F.2d at 1098. We agree with Nickerson that Indiana, Ohio, Michigan, and Iowa have less stringent procedures for reviewing punitive damage awards than does Alabama. We cannot agree, however, that the difference results in a due process violation. Indeed, the district court's additional scrutiny of the award under the seven *Haslip* factors helps to ensure that the jury's verdict satisfied due process requirements. We find the district court's reasoning persuasive, and we affirm its conclusion that the award of punitive damages did not violate constitutional standards.[7]

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[7] Nickerson submits that this court's concern in *Union Nat'l Bank v. Mosbacher*, 933 F.2d 1440, 1448 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 870 (1992), about the constitutionality of the Arkansas law of punitive damages after *Haslip* casts doubt on the award in this case. We disagree. The portion of *Mosbacher* referenced by Nickerson is dicta, because this court explicitly refused to reach the constitutional due process issue and subsequently

IV.

St. Joseph Valley Seed Company cross-appeals from the denial of prejudgment interest on its award of exemplary damages. Under Michigan law, "[i]nterest shall be allowed on a money judgment recovered in a civil action. . . . " Mich. Comp. Laws Ann. § 600.6013 (West 1992). The district court denied St. Joseph Valley's motion for interest, stating that it had found no Michigan case that allowed prejudgment interest on exemplary damages.

We review a district court's determination of state law *de novo*. *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1221 (1991). Here, we must decide whether the Michigan Supreme Court would treat an award of exemplary damages as a "money judgment."

The Michigan Supreme Court has said that section 600.6013 is a remedial statute and should be liberally interpreted. *Denham v. Bedford*, 287 N.W.2d 168, 171 (Mich. 1980). The purpose of the statute is to "compensate the prevailing party for delay in receiving money damages." *McCahill v. Commercial Union Ins. Co.*, 446 N.W.2d 579, 586 (Mich. Ct. App. 1989).

The Michigan courts have defined the term "money judgment" as a judgment which "adjudges the payment of a sum of money, as distinguished from directing an act

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remanded *Mosbacher* to the district court for review in the light of *Haslip*. *Id*. Consequently, the *Mosbacher* dicta has no application to this case, especially given the district court's thorough review of the award under the seven factors mentioned in *Haslip*.

to be done." *Department of Treasury v. Central Wayne County Sanitation Auth.*, 463 N.W.2d 120, 122 (Mich. Ct. App. 1990). A treble damage award is a money judgment, *Meehan v. Michigan Bell Tele. Co.*, 436 N.W.2d 711, 728 (Mich. Ct. App. 1989); and a plaintiff may collect both prejudgment interest and a penalty interest award, *McCahill*, 446 N.W.2d at 587 (though here prejudgment interest, by statute, offset penalty interest). Moreover, in *Goins v. Ford Motor Co.*, the court stated that section 600.6013 "applies to all damages sought and sustained in a civil action brought for the recovery of money damages." 347 N.W.2d 184, 192 (Mich. Ct. App. 1983). On the strength of these cases, we believe that the Michigan Supreme Court would treat an exemplary damage award as a "money judgment."

Accordingly, we affirm that portion of the judgment which awards compensatory and punitive damages, reverse that portion of the judgment which denies St. Joseph Valley Seed Company's claim for interest, and remand to the district court with instructions to enter judgment for interest on the award of exemplary damages.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

LATHAM SEED COMPANY; THE OHIO GRAIN COMPANY, f/d/b/a/ Ohio Soil Service, Inc.; SCHETTLER SEED FARM, INC., d/b/a Diamond Brand Seeds; RUPP SEEDS, INC.; SHOCKNEY SEED SERVICE, INC.; DIENER BROS., INC.; CHARLES O. LAVERTY, d/b/a Laverty Seed Farm; ST. JOSEPH VALLEY SEED CO., d/b/a M.F.I. Seeds; COOMER SEEDS, INC.; SETTLEMYRE SEED COMPANY, Plaintiffs, vs. NICKERSON AMERICAN PLANT BREEDERS, INC., d/b/a Agripro Seeds, Defendant.	CASE NO. 85-3114 RULING ON POST-TRIAL MOTIONS (Filed Aug. 2, 1990)

The court has before it: Plaintiffs' Application for Funds held in Registry Account; Plaintiffs' Motion to Alter, Amend or Correct Judgment with Respect to Interest; and Defendant's Motion for Judgment Notwithstanding the Verdict or, in the alternative, for a New Trial.

Argument was heard on these motions on June 19, 1990 and the court considers the matters fully submitted.

Funds Held in Registry Account

The court will first address Plaintiffs' Application for Funds held in Registry Account. Pursuant to an Order issued by the Honorable Donald E. O'Brien on July 1, 1985 five of the plaintiffs deposited a total of $222,072.10 with the Clerk of Court pending disposition of this lawsuit. Plaintiffs seek release of these funds based upon the jury's verdicts denying defendant's counterclaims against each of the plaintiffs. Defendant argues that the funds should not be released because the jury's verdicts against it on its counterclaims were in error. The court finds no such error. Accordingly, the Clerk of Court is ordered to release and deliver to the trust account of Johnson, Erb, Latham, Gibb & Carlson, P.C. all funds deposited by or on behalf of the plaintiffs in this action together with accrued interest less any charges and fees arising out of the Clerk's duties with respect to those funds.

Motion to Alter, Amend or Correct Judgment With Respect to Interest

The court next addresses plaintiffs' Motion to Alter, Amend or Correct Judgment with Respect to Interest. This motion has two parts. First, plaintiffs seek to have the court amend its judgment with regard to the only Michigan plaintiff, St. Joseph Valley Seed Co., so as to award prejudgment interest on the $1,000,000 awarded by the jury as exemplary damages and to modify the judgment to indicate that such interest is to be compounded

annually. Second, plaintiffs seek an order from the Court finding that the Ohio plaintiffs are entitled to prejudgment interest on the compensatory damages they were awarded because of the lack of a good faith attempt by defendant to reach a settlement.

The court declines the invitation to award prejudgment interest on the $1,000,000 exemplary damage award to St. Joseph Valley Seed Co. As indicated to the jury, in Michigan, exemplary damages are awardable as compensation for injuries incapable of precise computation which are the result of malicious conduct by the defendant and which have not otherwise been compensated for. Plaintiffs assert that because such damages are compensatory in nature they should be subject to an award of prejudgment interest under M.C.L.A. 600.6013. Although the court finds some theoretical merit to the argument, it has found no Michigan case which has made such a ruling. Accordingly, this aspect of the motion is denied. The court does, however, order the judgment in favor of St. Joseph Valley Seed Co. amended to specify that the prejudgment interest on the $92,077 in actual damages is to be "compounded annually" in accordance with M.C.L.A. 600.6013(4).

The court also declines to find that the Ohio plaintiffs are entitled to prejudgment interest based upon the defendant's alleged lack of good faith efforts to reach settlement. Under Ohio law, the Ohio plaintiffs are entitled to prejudgment interest on their compensatory damage awards only if this court finds that plaintiffs made a good effort to settle the case but defendant failed to make such an effort. Ohio Rev. Code Ann. § 1343.03. This court cannot make such a finding as it finds that both parties,

prior to trial, failed to make sufficient efforts at settlement. Admittedly, settlement would have been difficult in this case because of the number of plaintiffs and because of the case's complexity. Further, the court's own pre-trial settlement procedures were lacking in that they failed to provide for individual negotiation between each plaintiff and defendant. However, the limited record before the court on this matter convinces it that both sides could have done substantially more to promote settlement. Reasonable minds could have found accommodation in this case. Accordingly, this aspect of the motion is also denied.

Motion for Judgment Notwithstanding the Verdict

Finally, the Court turns to defendant's Motion for Judgment Notwithstanding the Verdict, or in the alternative, for a New Trial, in which defendant challenges the judgment of the jury and the actions of this court on numerous grounds. The vast majority of these challenges were presented, and ruled on, during the course of the trial. As little would be gained in the record by making further ruling on these issues the court incorporates by this reference all prior rulings with regard to these matters. There are, however, several issues which do warrant further analysis by this court. Prior to rulings on these issues the court finds it appropriate to provide a short history of this case.

This lawsuit has been in the Northern District of Iowa since its filing in early 1985. In the first instance 13 plaintiffs brought a consolidated action against defendant

based upon RICO allegations and pendent state law matters. Judge O'Brien dismissed the RICO allegations but retained jurisdiction of the pendent matters.[1] Subsequently three of the plaintiffs settled their cases with defendant. This left for trial with this court a lawsuit involving ten plaintiffs from four different states – Ohio, Michigan, Indiana and Iowa – with all claims based on pendent state law causes of action. The court, shortly after the case was transferred to it, indicated to counsel concern about whether it should continue to retain pendent jurisdiction over the lawsuit, and if so, whether the ten consolidated cases should be severed into separate causes of action. All parties argued strenuously that the court should retain its pendent jurisdiction, but disagreed about whether the case should be severed with plaintiffs objecting to severance and defendants in favor of it. The court, based on the arguments presented to it, retained jurisdiction and denied severance.

Shortly after the trial of the lawsuit began plaintiffs withdrew their objection to severance and the court revisited the issue of severing the lawsuit into ten separate trials with the parties. All of the evidence which had been admitted to this point in the trial was admissible with regard to plaintiff Latham Seed Co. and the court indicated its willingness to consider severance with the understanding that the court would proceed on with the

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[1] Although there has been a significant change in the law related to RICO since Judge O'Brien's dismissal of the RICO charges this court was never asked to revisit the issue and it has not done so.

suit involving Latham Seed Co. and that it would immediately continue on with the other cases when the Latham suit was concluded. Defendant objected to such severance arguing, among other things, that it would be prejudiced by such a move as it had fully prepared for a consolidated trial and that the court should accordingly continue on with the cases in a consolidated manner. The court accepted defendants wishes on this matter and moved ahead with the trial of the lawsuit as a whole.

The court further announced at this time its belief that this case had been lingering on the docket long enough and that it was going to make every attempt to bring about a finality. Pursuant to this the court took a liberal view of the admission of evidence with the understanding, made explicit to the parties, that it was reserving the right to change such rulings at any appropriate time. The most challenged aspect of such rulings were defendant's objections that the court was improperly allowing inadmissible parole evidence. A review of the record convinces the court that the approach it took was proper for a number of reasons.

First, the applicable law regarding the proper construction and interpretation of contracts was not identical for each of the plaintiffs. Instead, jurisdictions differed in whether extrinsic evidence beyond the written language of the marketing agreements could be used in determining: whether the marketing agreements constituted an integrated contract; the construction of the contracts; whether the language in the agreements was ambiguous; and the proper interpretation of any ambiguous terms. The court determined, after studying case law from the relevant jurisdictions, that in order to properly rule it

would need to allow in a wide scope of evidence and then, based on its role in construing the contract, carve out any claims that were unsubstantiated and instruct the jury on the ways in which it could consider the evidence that was received. The related fraud claims also necessitated a liberal view of the admissibility of the evidence.

Second, once the evidence was introduced the court actively carved out unsubstantiated claims and clearly instructed the jury on the limited manner in which it could consider certain evidence. For example, the court, as part of its role in construing the contract, struck out plaintiffs' claims based on an alleged "evergreen or long term" agreement beyond the written term of the marketing agreement and instructed the jury that the evidence related to this claim could only be considered with regard to the claims of fraudulent representations.[2] The court also successfully persuaded plaintiffs to withdraw their claims of tortious interference with contract and persuaded defendant to withdraw its claims of fraud. Thus, although a substantial amount of evidence was introduced on a number of claims, only a relatively limited number of claims were actually submitted to the jury.

Third, after deleting unnecessary claims the court attempted to craft an easily comprehensible set of instructions which would clearly guide the jury through its role. The parties were helpful to the court in this manner agreeing on the basic measure of damages and in the

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[2] The court also insured, by allowing plaintiffs to introduce its evidence regarding its claims of an "evergreen" agreement, that any reviewing court would have a complete record upon which to determine the appropriateness of striking this claim.

format used by the court. A review of these instructions leads the court to conclude that it met its goals and provided the jury with a completely accurate statement of the law in as comprehensible a manner as was possible.

Finally, the jury's verdicts render defendant's evidentiary objections moot in that the jury found in favor of defendant on the claims for which the court's liberal evidentiary rulings created potential problems. The only contractual claims upon which the jury held in plaintiffs' favor involved ambiguous language in the written marketing agreement and verbal agreements with regard to non-integrated portions of the marketing agreement. The law in each of the jurisdictions gives the jury the right to consider extrinsic evidence in making such determinations. Further, the jury's answers to the various interrogatories convince the court that the jury properly limited its consideration of evidence to the manner in which it was instructed to by the court. Indeed, the jury in this case was one of the most conscientious which the court has had the pleasure of working with.

Defendant also raises a number of objections to the sufficiency of the evidence, both with regard to the jury's answers to interrogatories and to the amount of damages awarded. The court cannot agree with defendant's objections. Although the court deems it unnecessary to respond to all such objections, some response may be helpful.

With regard to the breach of contract claims defendant emphasizes the contention that there was insufficient evidence to find that defendant breached its contract with plaintiff associates by going into direct

competition with them prior to the expiration of the contract term. The main basis for this argument is language in each of the marketing agreements stating that "no exclusive rights of any kind are granted to associate". The problem with the argument, which was forcefully argued to the jury, is that there was sufficient evidence to establish that at the time the parties entered into the contracts it was understood and intended by all that the language meant only that no single associate had the exclusive right to sell an Agripro brand or brands in any given area as against any other associate.[3] Further, the evidence was also sufficient to establish that there was a contractual agreement that Agripro brand soybeans would be sold only through the Associate system of marketing and not in any other manner.

Defendant also emphasizes its argument that there was insufficient evidence of fraud. In doing so, however, the defendant presents the evidence in the light most favorable to it, rather than in the light most favorable to the jury's verdict. For example, although defendant asserts that there was no evidence that it made the decision to terminate the associates prior to mid-1984, there was significant circumstantial evidence that the decision to terminate the Associates was made in early 1983. Similarly, there was sufficient evidence for the jury to find that defendant: actively represented it would be open and

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[3] Even the drafter of the language at issue, a former president of defendant, agreed that the language was neither understood or intended to allow defendant to sell Agripro soybeans directly or through non-associates.

honest with plaintiff concerning any changes in the Associate system; knew plaintiffs were relying on such openness and encouraged them to rely on such openness; took advantage of such reliance by getting plaintiffs to devote their resources to extensively promoting and planting Agripro soybeans for the 1984 season after defendant had already decided that it would terminate the plaintiffs and go into direct competition once plaintiffs planted the 1984 crop; and knew such actions were deceiving and harmful to plaintiffs because they caused plaintiffs to devote their resources to a brand they would be in direct competition with by the time their 1984 crops were ready for sale.[4] Thus, contrary to defendant's assertions the evidence was sufficient to support the jury's verdicts on these matters.

The court also finds sufficient evidence for the jury to find that defendant acted with malice and ill-will towards the plaintiffs in their fraudulent activities under the evidence discussed above. Such evidence, viewed in the light most favorable to the verdicts, ranged from the extreme of working to convince plaintiffs to plant more Agripro in 1984 by telling them Agripro and the Associates were headed for one of their best years while secretly intending to terminate the Associates once plaintiffs had the soybeans planted in the ground, to the pettiness of making plaintiffs sell the Agripro seed they did produce in 1984 in outdated bags while defendant used new packaging with a new logo in its direct sales of the same

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[4] The court's review of some of the evidence supporting the verdicts is by no means intended to be a comprehensive review of all of the evidence supporting the jury or of all of the elements necessary to establish any cause of action.

soybean varieties. Accordingly, It was within the jury's discretion to award punitive damages.[5]

The final issue which the court will address is the level of the punitive damage awards. The jury, after sitting through nine weeks of testimony, made the judgment that each plaintiff was entitled to $1,000,000 in punitive or exemplary damages, for a total award of $10,000,000.

After considerable reflection the court finds that the decision of the jury on this matter was not an abuse of its discretion. Although such an award appears in some aspects overly generous, the court cannot say that the award shocks its conscience. Nor is it so excessive that it demonstrates bias, passion, prejudice, corruption, or other improper motives or causes. Instead, the court considers the amount simply a reflection of the fact that the jury found defendants actions with regards to plaintiffs

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[5] One of the alleged errors in the case is the court's refusal to strike the evidence showing that defendant set up a plan under which it employees were to go to plaintiffs' places of business with a false cover story which would allow them to gather the names of plaintiffs dealers so that they could "steal" them from plaintiffs. Defendant argues that the evidence was irrelevant because plaintiffs withdrew their tortious interference with contract claims. The proposal, however, was not an incident totally isolated from the rest of defendant's actions. Instead, it was arguably an indication of the approach defendant brought to its decision to terminate the associates and of its real motivations. For example, defendant's internal documents established that one of its main priorities was to keep the Associates from learning about their impending termination. Defendant argued that it was concealing the information for the benefit of the associates. Plaintiffs were entitled to point to the plan to steal their dealers as evidence of defendant's actual motivations and concerns.

so fraudulent and so egregious as to merit such an award.[6]

One concern raised by defendant is the fact that no net worth statement of defendant was ever introduced into evidence. Several matters are worth mentioning on this point. First, the court made it clear to defendant after plaintiffs rested their cases that it would be submitting the issue of punitive damages to the jury. Accordingly, defendant had every opportunity to introduce its net worth statement into evidence if it was concerned that its relationship with the Royal Dutch/Shell organization would lead the jury to conclude that its resources were greater than they were.[7] Second, none of the jurisdictions at issue require that a net worth statement be introduced into evidence. Third, there was sufficient other evidence of the financial condition of defendant introduced

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[6] It is worth noting that the evidence established that the plaintiffs in this lawsuit were the very individuals responsible for much of the success of defendant through their active participation in the sales, development and promotion of Agripro seeds. It is likely that the jury considered this fact in determining the level of the awards. The court cannot say that such a consideration is inappropriate once the factual basis for an award of punitive damages is established, as it was in this case.

[7] Defendant's relationship with Shell Oil Company (Shell) was brought to the attention of the jury by both parties. Several relevant documents referred to Shell and defendant chose to have persons associated with Shell act as some of its key witnesses. The court did instruct the jury that in setting any punitive damage award it could only consider the financial resources of defendant, and not of any other companies mentioned during the trial.

throughout the trial to support the jury's consideration of this issue in setting its punitive damage awards.

Defendant also asserts that the level of the award is too high with regard to its net worth and with regard to the amount of compensatory damages which were awarded. Tackling these issues presents the court with the issue of whether it should consider these arguments in relation to a total award of $10,000,000 or with regard to the individual awards of $1,000,000. The court finds considerable merit to approaching the case as a whole, even though the awards were actually all separate.[8] As such, the ratio of punitive damages to compensatory damages is slightly less than 10 to 1 and the punitive damage award amounts to approximately 20% of what defendant alleges its net worth is.

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[8] The jury foreman's indication to the court at the time the verdicts were rendered that it did set the exemplary damage award for St. Joseph Valley Seed Co. under the separate standard required by Michigan law satisfied the court's concerns on this matter. Defendant now objects to the instruction with regard to this plaintiff on the ground that the court should not have used the example of damage to business reputation as the type of damage that the jury could consider in setting any exemplary damage award with regard to this plaintiff. The court drew this example from Michigan case law and indicated to defendant that it would remove this example if requested. The court further notes that if defendant is asserting that the jury wrongly awarded this money as punishment, rather than as compensation, than it is arguable that to the extent that any such amount is removed from this plaintiff it would need to be distributed evenly among the remaining plaintiffs to insure that defendant is punished in the amount found necessary by the jury.

The court has found no case law in any of the relevant jurisdictions holding that either of these percentages are invalid as a matter of law. Obviously they are significant enough to require a searching examination by the trial court of the record, and this court has engaged in such thoroughly considering the issue of remittitur. The court finds, however, that granting any remittitur in this case would merely be replacing its judgment for the jury's, even though the jury did not act beyond its discretion – a conclusion the court is convinced will be shared by any party that takes the time to review the complete record in this case. The court can simply not hold that the level of the jury's award was in error. The court finds this conclusion supported by the relevant case law from the various states as well as by *Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Nos. 88-5496/5520, slip op. at 29 – 34 (8th Cir. June 15, 1990).

Defendant also asserts a due process challenge to the award of punitive damages. Defendant has not met the burden of proving that the due process clause was violated. *See Davis*, slip op. at 35-36. The jury was instructed that such damages were only awardable if they found that the fraudulent actions of defendant causing damage to plaintiffs were reckless, wanton or malicious and that if they awarded such extraordinary damages they must do so "with calm discretion and sound reason and must never be either awarded or affixed in amount because of any sympathy, bias or prejudice with respect to any party in the case." Further, the court's instruction that the jury "may" consider certain factors provided more direction to, and limitations on, the jury than defendant's proposed instructions on punitive damages. Finally, the court has

actively reviewed the jury's award to insure that it is not so excessive as to violate due process or establish undue prejudice.[9]

This was a long drawn out case. After a complete revisitation of the record and the issues involved the court finds that the jury's verdicts should be affirmed and all objections overruled. The court firmly believes that proper instructions were given to the jury. Under these instructions the evidence clearly supports the compensatory damages awarded. The only troublesome problem as it relates to this case is the jury's award of punitive damages in the amount awarded. To attempt to examine the punitive damages individually in this case creates chaos. Furthermore, even if this court wanted to allow remittitur it could only be done on the basis of substituting its judgment for that of the jury. This court declines to so interfere. Under the special interrogatories submitted to and passed upon by the jury all other relevant objections have been rendered moot.

IT IS THEREFORE ORDERED that defendant's Motion for Judgment Notwithstanding the Verdict is DENIED.

IT IS FURTHER ORDERED that plaintiffs' Motion to Release Funds Held in Registry is GRANTED and the Clerk of Court is so directed, and that plaintiff's Motion to Amend Judgment with Regard to Interest is GRANTED

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[9] Recent challenges to punitive damage awards appear to the court to place their continued legitimacy in somewhat of a state of limbo. However, for purposes of this case, this court is bound to follow the dictates of the current relevant state and federal law on the issue of punitive damages.

to the extent that the Judgment in favor of St. Joseph Valley Seed Co. is amended to indicate that pre-judgment interest is to be compounded annually but is in all other respects DENIED.

FINALLY, IT IS ORDERED that the stay of execution of judgment is removed.

DATED THIS 1st Day of August, 1990.

/s/ William C. Hanson
William C. Hanson
Senior U.S.
District Judge

Copies mailed on AUG 02 1990
to counsel of record or pro se
parties as shown on the docket
sheet. W/Amended Judgment

/s/ Illegible
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

LATHAM SEED COMPANY, et al., Plaintiffs, vs. NICKERSON AMERICAN PLANT BREEDERS INC., Defendant.	)	CIVIL NO. C85-3114 ORDER (Filed Sep. 30, 1991)

Under the mandate of the 8th Circuit Court of Appeals this court reviews whether the punitive damages in this case are reasonable in light of the standards set forth in *Pacific Mutual Life Insurance Company v. Haslip*, 111 S. Ct. 1032 (1991), a most recent pronouncement of the Supreme Court of the United States.

In accordance with the mandate, oral arguments have been heard and briefs received in connection with the same. In addition, the court has ordered proposed findings and conclusions of law by the parties. Although not expressly adopting either proposed findings and conclusions, nevertheless, they are part of the record so those who ultimately dispose of the cause will have the opportunity to study these proposals. The court's ruling entered August 2, 1990, is also incorporated in this order by reference. Finally, plaintiffs and defendant have submitted affidavits and exhibits with regard to this matter which allegedly were not admitted into evidence at trial. Any reference made to them by the parties are outside the record.

In *Haslip*, the Supreme Court held the award of punitive damages does not violate due process if they are reasonable in their amount and rational in light of their purpose. In *Haslip*, the Court was considering Alabama law; in Alabama a court reviewing an award of punitive damages must consider:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Haslip at 1045. The Court determined the application of these seven standards imposed a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages to satisfy due process. *Id.*

Unlike Alabama, which applies the above series of specific factors to determine whether an award of punitive damages is excessive, the standards of the four states

involved here are much broader. This court must determine whether these broad guidelines have also imposed a sufficiently definite and meaningful constraint on the discretion of fact finders.[1]

Before applying the individual state standards to this case, it is helpful to review the basis for the punitive damage award. There is evidence to support and the jury could so find the following. Defendant's company began as a genetic research and development corporation to produce superior varieties of soybean seeds. The company was sold in 1973 to Agripro, Inc. The soybeans were registered under the Plant Variety Protection Act which prevented the production and marketing of the seed by anyone except Agripro, Inc.

Agripro, Inc. used an associate marketing system where associates purchased soybean seed from Agripro, Inc. and reproduced it in commercial quantities. The associates cleaned and bagged the seed and then sold it to their own dealers who in turn would sell the seed to farmers. The associates paid a premium price for the foundation seed and also paid a royalty to Agripro, Inc. on each bag of Agripro seed sold.

In 1976, Agripro, Inc. was sold to North American Plan Breeders, Inc., now Nickerson American Plant Breeders, Inc. (NAPB). Prior to the sale, NAPB officers

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[1] There is ample support in the record that exemplary or punitive damages were appropriate. Additionally, the Eighth Circuit mandate confines this court's review to whether the punitive damages are reasonable. Thus, this certification does not address any due process considerations with regard to the jury instructions given.

contacted the associates to assure them the system would continue and the "partnership" relationship between them and NAPB would remain.

In 1982, the associates entered into three-year marketing agreements with defendant. The parties agreed in order to complete performance, the terms of the contracts would have to extend beyond the 1986 selling season. Thus, the 1982 contracts allowed plaintiffs to purchase foundation seed from NAPB through the spring of 1985. The seed grown in 1985 was to be marketed to farmers in the spring of 1986.

In 1983, Warren Melles became president of NAPB. Melles hired consultant John Parke to evaluate NAPB's marketing structure. Parke recommended the name Agripro be used for all its products, and to use direct marketing rather than the associate system of marketing. NAPB adopted these changes but did not make a formal announcement regarding the change in marketing until July of 1984.

At trial, the jury found defendant had breached its contract with plaintiffs by terminating the associate program and by directly competing with them during the term of the marketing agreement. The jury also found defendant fraudulently concealed its plans and intentions from plaintiffs.

STATE LAW STANDARDS

In Indiana, an award is vacated only if it is the result of passion or prejudice, and the court is required to

consider the nature of the tort, the extent of actual damages, and the economic wealth of the defendant. *Whittaker v. Dail,* 567 N.E.2d 816, 826 (Ind. Ct. App. 1991).

The primary focus in review of a punitive damage award in Iowa is the relationship between the punitive damage award and the wrongful conduct of the offending party. *Ryan v. Arneson,* 422 N.W.2d 491 (Iowa 1988). To determine if the award is a result of prejudice and passion, the trial judge should "consider whether the punitive damages award is reasonably related to the malicious conduct of the defendant which resulted in actual injury or damage to the plaintiff." *Id.* at 496.

Ohio law requires the fact finder to consider the amount of damages, whether damages are induced by misconduct or error, and defendant's conduct in relation to the injuries. *Villella v. Waikem Motors, Inc.,* 45 Ohio St. 3d 36, 543 N.E.2d 464, 468-69 (1989).

Michigan does not allow punitive damages but does make provision for an exemplary award. These exemplary damages are not to punish the defendant but to render the plaintiff whole when defendant commits a voluntary act which inspires feelings of humiliation, outrage, and indignity. *Jackson Printing Co. v Mitan,* 169 Mich. App. 334, 425 N.W.2d 791, 794 (1988). The damages must be reasonable and justified. *Id.*

HASLIP FACTORS

As stated before, the laws of Indiana, Iowa, Michigan, and Ohio are much broader than the specific factors given in Alabama. However, these are useful guidelines

in determining the appropriateness of punitive damages in this case.

Whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred

Defendant argues there is no reasonable relationship between the punitive damage award and the actual harm incurred. The jury found distinct actual damages for each plaintiff but awarded each one million dollars in punitive damages. Defendant argues under *Morrissey v. Welch Co.*, 821 F.2d 1294 (8th Cir. 1987), such awards are prohibited.

In *Morrissey*, two of the three plaintiffs received $750,000 in punitive damages but were awarded $3,000 and $15,000 respectively in actual damages. The Eighth Circuit remanded the punitive damage awards stating there was no correlation of the punitive award to the injury inflicted as required by Missouri law. *Id.* at 1299.

Morrissey can be distinguished from this case because Missouri law requires punitive damages to bear a relation to the injuries inflicted. *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 586 (8th Cir. 1981). Indiana, Iowa, Michigan, and Ohio, however, also compare punitive damages to the wrongful conduct. This analysis is more flexible than the Missouri requirement, and thus, *Morrissey* is inapplicable to this case. Additionally, even though the punitive damage awards are uniform, they do bear a reasonable relationship to the harm caused by defendant's conduct.

Plaintiffs expected the associate system to continue, thus, they spent much time and effort establishing contacts with dealers and establishing the positive reputation of the Agripro name. When it was announced that the associate level would be terminated, plaintiffs had a difficult time reestablishing their sales. Of the ten plaintiffs, six sold no private label soybean seed. Their only soybean sales were of the national brand, Agripro, and the public varieties. After termination, each of those plaintiffs was faced with rebuilding his business without a national brand. Substitution was not available because the Agripro varieties were protected by the Plant Variety Protection Act, and the associates could not obtain the same profit per bag from public or private varieties as from a national brand.

Further, the associates who had private label soybeans were not able to obtain a substitute national brand of soybean seed to sell. None of them could obtain the exclusive rights to other soybean varieties or if they were able to obtain private label soybeans to sell, they were not able to obtain the exclusive rights to market the varieties. The same private label bean was available to all independent sellers.

As will be discussed later, the result of terminating the associate system was an increase in profit per unit to the defendant. This profit was estimated at approximately ten million dollars.

Given the nature of the harm, the conduct of the defendant, and the amount of profit to the defendant, the court finds there is a reasonable relationship between the

punitive damages award and the harm resulting from defendant's conduct.

The degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct

REPREHENSIBILITY

Defendant's conduct was reprehensible in several respects. First, defendant deliberately mislead plaintiffs regarding the status quo of the associate system. For example, after the decision to terminate the associates had been made, Coomer Seed contracted as a new associate and Ohio Soil was encourage to continue exclusively selling Agripro brand soybeans. Defendant also encouraged associates to plant more foundation seed in 1984.

There is evidence to support the finding that defendant's conduct was also reprehensible with respect to capitalizing on plaintiffs' time, work, and energy. Plaintiffs revealed confidential sales and distribution data to defendant with the implied understanding that such information would benefit both NAPB and its associates. This information, often gathered in a covert manner, was used to prepare a detailed analysis later used to compete with the associates.

Defendant acquired all of the associates' dealers, customers, and sales of Agripro brand soybeans, thereby increasing defendant's profit margin at the expense of the associates. One of Parke's reports stated a reason for the change in the method of defendant's operations was

because there were Agripro dealers which defendant could expand upon. Those dealers were ones the associates had developed; none of them had previously dealt with the defendant. Prior to the termination of the associates, defendant had not sold any Agripro soybeans.

The evidence showed the associates were a primary factor in establishing the positive reputation of the Agripro name. The decision to use the name for all defendant's products was partially motivated by a desire to use the favorable reputation which the associates had developed for the name through their own efforts. The jury could have concluded that defendant intended to destroy the associates' businesses, to acquire all the associates' Agripro soybean seed sales, and to use the dealers which the associates had established.

Defendants actions in this case were reprehensible.

DURATION OF THE CONDUCT

The jury could find from the evidence that the decision to terminate the associates was made on April 11, 1983, but not announced until July 13, 1984, after the associates had purchased and planted foundation seed. The associates had continued to build their businesses based upon the expected continuation of the associate program.

The growing, conditioning, production, and sale of bags of Agripro soybean seed was an ongoing process. Associates analyzed sales from prior years, results of test plots, and reports of university testing to decide which varieties to purchase for planting. The associates then

placed their seed stock orders with defendant. In the spring, the foundation seed was planted by the associates or by their custom growers. At the end of the growing season, the seed was harvested and delivered to the associates who paid a premium to their custom growers. During the fall and winter, the seed was cleaned, conditioned, treated, bagged, and warehoused. During the same time period, the associates were holding summer field days and sales meetings and were advertising their products. Soybean seed sales commenced in the fall and concluded at the end of planting the following spring.

This was not a situation where a sudden change in the marketplace forced defendant to change its marketing plans. Defendant commenced a long and exhaustive process of planning and analysis to prepare NAPB to acquire the associates' businesses, their dealers, and to compete directly with them.

Concealing its decision prevented plaintiffs from preparing for the change. For this reason, the duration of the fraud was particularly damaging.

DEFENDANT'S AWARENESS OF WRONGDOING

A review of the record reveals defendant's highest officers were not only aware of the plan, but had actually conceived it. The decision to terminate the associate system came at the highest level of NAPB's management. There is no dispute defendant was aware of the concealment.

CONCEALMENT

Defendant claims it was not concealing any information but instead was keeping a business decision confidential so the marketplace would not be disrupted. This was precisely the issue put to the jury, and it concluded this withholding of information was indeed fraudulent concealment. Thus, concealment was the nature of the fraud itself.

THE EXISTENCE AND FREQUENCY OF SIMILAR PAST CONDUCT

Plaintiffs presented no evidence of past conduct similar to their termination. They did present evidence of simultaneous similar conduct directed at all 35 associates. The jury knew the conduct was directed at a large number of parties, most of whom did not bring suit.

The profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss

Defendant claims it received no profit as a result of the fraudulent concealment. There was sufficient evidence for the jury to conclude otherwise.

There was evidence to conclude that terminating the associate system would increase defendant's profits by $1.8 million every year. The jury could find defendant anticipated it would increase its profit margin on Agripro soybeans by terminating the associates. NAPB planned to increase its margin on Agripro soybeans from $.95 royalty fee to $2.75 per unit by implementing this plan. At the March 1984 sales level of one million bags of Agripro, this

amounted to $1.8 million per year of additional profit, or $10 million in five and a half years.

The record further shows that one of the reasons for use of the Agripro name for all of NAPB's products was the existence of the plaintiffs' Agripro farmer-dealer organization which could be expanded upon. NAPB's vice president admitted the only reason that required the termination of the associates was defendant's expansion of the farmer-dealer organization. By eliminating the associates, defendant could increase its share of the profits from Agripro soybean sales and acquire the associates' dealers.

The jury could consider the prospect that defendant would derive $1.8 million in annual additional profits by terminating the associate system. It was proper for the jury to remove that profit which defendant earned as a result of its wrongful conduct.

The "financial position" of the defendant

A concern raised by defendant was that no net worth statement of NAPB was ever admitted into evidence. The court made it clear after plaintiffs had rested their case that it would be submitting the issue of punitive damages to the jury and defendant had opportunity to introduce its net worth statement into evidence if it was concerned its relationship with the Royal Dutch/Shell organization would lead the jury to conclude its resources were greater than they were.

Further, other evidence of the financial condition of defendant introduced at trial shows the award is not excessive. This includes defendant planned to increase its

Agripro profit margin by $1.80 per unit, defendant's projected 1985 revenues were $78.9 million, and 1990 revenues were $164.9 million.

Finally, there is no doubt that the evidence clearly shows that almost from the date of purchase defendant represented itself as fully able and willing to support any financing necessary and incidental to producing a superior soybean seed. The associates believed that representation, and the jury could have made that finding as well.[3]

Keeping in mind the purpose of punitive damages is to punish and deter, the court does not find the award was excessive in light of defendant's financial position.

Costs of litigation, imposition of criminal sanctions, and the existence of other civil

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[3] Since the final submission in this case defendant has called this court's attention to *Adams v. Murakami*, 284 Cal. Rptr. 318, 813 P.2d 1348 (1991), which hold that the financial condition of the defendant is a prerequisite to any punitive damages and that the burden is on the plaintiff to prove the financial condition. That assumes that if there is no evidence of the defendant's financial condition, the jury is required to speculate.

The *Adams* case not only is an incorrect statement of the law as indicated in the articulate dissent, but is contrary to the majority of sister states. It also does not address the case at bar.

There has been and is evidence of defendant's financial condition sufficient to allow the jury to believe the defendant had a net worth far in excess of the punitive damages assessed. Further, attempts by plaintiff to show defendant's condition was resisted at every step in the proceedings. The plaintiff has made a prima facie case regarding the financial condition of the defendant, and there has been a minimum of evidence by defendant to disprove the premise. If this defendant sought to prove poverty, it should have moved forward. It chose not to do so.

awards against the defendant for the same conduct, these also to be taken in mitigation

In general, a six-year-old case involves substantial legal expenses. There are no criminal sanctions appropriate here. Further, the statute of limitations has passed for any additional plaintiffs, so there is no possibility of other civil awards against the defendant for the same conduct. The court does not consider any of these factors to be significant in this case.

CONCLUSION

The Fifth Circuit has applied the requirements of *Haslip* to Mississippi law. It determined that in reviewing an award of punitive damages, "the court may only consider whether the circumstances of the case offer some support for the amount of the award. If there are *any* circumstances of probative force that support the amount of the award, then the award meets the 'reasonableness' prong of the due process test in *Haslip*." *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1382 (5th Cir. 1991) (original emphasis). This court finds the Fifth Circuit's reasoning convincing and applies it here.

Many of the historical facts and documentary proof contained within the findings are in agreement. The documentary evidence and the evidence of the former employees who held high positions in the corporate entity is clearly in support of plaintiffs' position. From the date defendant purchased Agripro the associate system of raising the seed and marketing the product was considered by all to be the established modis operandi. The evidence supports and the jury could so find that

even while all parties seemed to be operating and attempting to negotiate contracts, the defendant from approximately 1983 was secretly considering termination of this system of operating, and was proceeding to a direct selling operation. The jury could conclude from the evidence that defendant was scheming, concealing and planning the termination of the associate system which had been in existence even prior to their purchase in 1976. There is evidence to support that while all parties appeared to be operating pursuant to contract and even at a time when there were negotiations for contracts, defendant was plotting to terminate the associate system and the contracts heretofore entered into.

In studying the proposed findings of both parties, it is obvious that many jury questions are raised. The jury found that defendant fraudulently concealed information from plaintiffs and that an award of punitive damages was justified. Although this court might have made a different award, the amount was not excessive or unreasonable in light of the evidence.

The court finds the law of each state imposes a sufficiently definite and meaningful constraint on the fact finders to satisfy due process, and that the punitive damage awards satisfy the standards of each state. The jury could have concluded from this evidence that the punitive award was reasonable in light of the circumstances. So far as actual damages are concerned, neither party seems to strenuously argue that they are not within the province of the jury to so find.

Certainly the evidence and conduct of the defendant in this case points directly to the integration of the entire

process of developing and marketing soybean seed. It is without doubt that the jury's findings indicate many pitfalls in this integration process.

Therefore, this court concludes there is evidence to support punitive damages such as have been found and considered in light of the standards set forth in *Haslip*. This court declines to substitute its judgment for that of the jury.

IT IS SO CERTIFIED.

Dated this 27th day of September, 1991.

Copies mailed on 9-30-91 to counsel of record or pro se parties as shown on the docket sheet.

/s/ S. Duenow
Deputy Clerk

/s/ William C. Hanson
WILLIAM C. HANSON
Senior Judge
U.S. District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2486/2550NIDF

Latham Seed Company, et al.,	*	
	*	
Appellees/Cross-Appellants,	*	Order Denying
vs.	*	Petition for
	*	Rehearing and
Nickerson American Plant Breeders, Inc., etc.,	*	Suggestion for
	*	Rehearing En
Appellant/Cross-Appellee.	*	Banc

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

Judge John R. Gibson took no part in the consideration or decision of this case.

December 22, 1992

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
MAR 15 1993
OFFICE OF THE CLERK

No. 92-1376

In The

Supreme Court of the United States

October Term, 1992

NICKERSON AMERICAN PLANT BREEDERS, INC.,

Petitioner,

v.

LATHAM SEED COMPANY, ET AL,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 15, 1993

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QUESTIONS PRESENTED

1. Because this case was reviewed under the *Haslip* standards, no question is presented regarding whether lesser standards would comply with due process.

2. Because the jury considered only evidence of wrongful conduct which was relevant to NAPB's fraud and malice, NAPB's second question lacks record support and has no merit.

3. Because the instructions limited the jury to consideration of the financial condition of NAPB in awarding punitive damages, NAPB's question alleging the instructions allowed the wealth of third parties to be considered is unfounded.

4. Because the punitive damage awards were proportional to the wrongful conduct and resulting harm, no due process issue is raised by the size of the punitive damage awards, and the fourth question has no merit.

RULE 29.1 STATEMENT

Latham Seed Company, located in Alexander, Iowa, is an Iowa corporation with no parent or subsidiary corporations.

The Ohio Grain Company, f/d/b/a Ohio Soil Service, Inc., located in Marysville, Ohio, is an Ohio corporation with no parent or subsidiary corporations.

Schettler Seed Farm, Inc., d/b/a Diamond Brand Seeds, located in Carroll, Iowa, is an Iowa corporation with no parent or subsidiary corporations.

Rupp Seeds, Inc., located in Wauseon, Ohio, is an Ohio corporation with no parent or subsidiary corporations.

Shockney Seed Service, Inc., located in Farmland, Indiana, is an Indiana corporation with no parent or subsidiary corporations.

Diener Bros., Inc., located in Reynolds, Indiana, is an Indiana corporation with no parent or subsidiary corporations.

Charles O. Laverty, d/b/a Laverty Seed Farm, located in Indianola, Iowa, is a proprietorship solely owned by Charles O. Laverty.

St. Joseph Valley Seed Co., d/b/a M.F.I. Seeds, located in Mendon, Michigan, is a Michigan corporation, and is a wholly owned subsidiary of Northern Star Companies, Inc., a Michigan corporation.

RULE 29.1 STATEMENT – Continued

Coomer Seeds, Inc., located in Woodburn, Indiana, is an Indiana corporation with no parent or subsidiary corporations.

Settlemyre Seed Company, located in Clarksville, Ohio, is an Ohio corporation with no parent or subsidiary corporations.

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INTRODUCTION

The Eighth Circuit Court of Appeals in this case fully implemented this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991). Petitioner, Nickerson American Plant Breeders, Inc. (NAPB), has misrepresented the record by claiming otherwise. Because submission and review in this case wholly conformed with *Haslip*, the Petition for Certiorari should be denied without further delay.

The instructions to the jury limited the jury's discretion to award punitive damages and protected the Defendant's right to due process under reasonable constraints consistent with *Haslip*.

The punitive damages awarded in this case have been scrutinized and approved by the courts five times. In its Ruling on Post-Trial Motions, the district court reviewed the award under the relevant case law from each jurisdiction involved as well as the Eighth Circuit. In addressing the due process challenge, the court "actively reviewed the jury's award to insure that it is not so excessive as to violate due process or establish undue prejudice." Pet. App. 33-34A[1] (The 1st review). NAPB's appeal was argued and submitted to the Eighth Circuit after *Haslip* was decided by this court. (The 2d review). The Eighth Circuit remanded the case to the district court to perform a searching review of the jury's award, fully consistent with the *Haslip* decision.[2] SA 1-3. The district

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[1] Citations to the Appendix to the petition will be styled "Pet. App. ___A." Citations to the attached Supplemental Appendix will be styled "SA___." Citations to the Joint Appendix in the court of appeals will be styled "JA___." Citations to the transcript will be styled "Tr. ___."

[2] The Eighth Circuit has applied the same procedure in all appeals that were pending when *Haslip* was decided. Beginning with *Robertson Oil Company, Inc. v. Phillips Petroleum Company*, 930 F.2d 1342 (8th Cir. 1991), cases were remanded to enable the

court conducted a careful analysis of evidence which supported the punitive damage award under the standards approved in *Haslip* as well as relevant state case law and made detailed written factual findings which supported the award. Pet. App. 36A-51A. (The 3rd review). The Eighth Circuit then, upon the appeal, scrutinized the record under both the *Haslip*-approved standards and state law standards and found the award to be consistent with due process under both standards. Pet. App. 1A-19A (The 4th review). NAPB petitioned for rehearing with suggestion for rehearing *en banc* and urged the grounds now raised in this Petition. The Eighth Circuit declined to rehear the case. Pet. App. 52A (The 5th review). NAPB's right to due process has been fully protected, and no due process violation occurred.

This case does not present the due process issues on which review was granted in *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W.Va.), *cert. granted*, 113 S.Ct. 594 (November 30, 1992) (No. 92-479). The West Virginia court refused to apply the *Haslip* factors in *TXO*. In contrast, NAPB has had the benefit in this case of the full panoply of procedural protections approved by this Court in *Haslip*. The instruction to this jury imposed a reasonable constraint on jury discretion to award punitive damages, like the instruction approved in *Haslip*. Review of the verdict has been given in accordance with the standard approved in *Haslip*, and the reviewing courts have determined that the punitive

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district court to review punitive damage awards under the standards approved in *Haslip*. *Cole v. Control Data Corporation*, 947 F.2d 313 (8th Cir. 1991); *Doe v. B.P.S. Guard Services, Inc.*, 945 F.2d. 1422 (8th Cir. 1991); *Union National Bank of Little Rock v. Mosbacher*, 933 F.2d 1440 (8th Cir. 1991). All of the Eighth Circuit's decisions since *Haslip* have reviewed the three levels of due process protection which this Court found to comply with due process in *Haslip*. The Eighth Circuit reversed the award of punitive damages in *Glover v. McDonnell Douglas Corp.*, 981 F.2d 388 (8th Cir. 1993).

damage award is not out of proportion to the severity of the wrongful conduct.

The issues raised in *TXO* are distinguishable and will not affect this case because:

1. These jury instructions clearly defined proper purposes for punitive damages and imposed definite and meaningful constraints upon the award of punitive damages;
2. These jury instructions did not permit the consideration of the financial condition or wealth of any party other than NAPB;
3. These jury instructions required proof of legal malice as a condition to the award of punitive damages;
4. These jury instructions required proof of entitlement to punitive damages by clear, convincing and satisfactory evidence for six of the Plaintiffs;
5. More than $1 million compensation for out-of-pocket loss was awarded for fraud;
6. Liability was imposed for common-law fraud, long a part of the law in all states involved;
7. All evidence of NAPB's wrongful conduct involved wrongful acts committed directly against the Plaintiffs;
8. The district court made an independent, on-the-record determination that there was a *prima facie* case for punitive damages before permitting Plaintiffs to comment on the financial condition of NAPB;
9. The district court conducted a searching post-trial review of the punitive damages under the *Haslip* standards, permitting the parties to fully brief and argue their positions and to file supplemental briefs and then made detailed, written findings of the facts supporting the award and the court's reasons for approving the award;

10. The Eighth Circuit permitted the parties to submit additional briefs and written arguments, conducted a full review under *Haslip*, undertook a thorough re-examination of the facts and rulings below and issued a decision that fully explained the reasons for the affirmance of the punitive damages; and
11. Not a single judge of the Eighth Circuit supported NAPB's petition for rehearing with suggestion for rehearing *en banc* which raised the same issues presented in NAPB's Petition for Writ of Certiorari.

There is no reason to delay the denial of certiorari in this case until *TXO* is decided. This case will not be affected by what is decided in *TXO*. Only a reversal of *Haslip* would warrant further proceedings in this case. Delay will only aggravate the injury NAPB has already inflicted.

This Court's ruling in *Haslip* has controlled this case. *Haslip* was carefully and meticulously followed. Liability for fraud was decided in accordance with the long-standing principles of the common law of Iowa, Indiana, Michigan and Ohio. No federal claims are involved. There is no conflict among the circuits. The circuit courts of appeal have uniformly ruled that the procedures followed in this case afford a defendant due process. Those standards are clearly articulated by this Court in *Haslip*. Because the only question presented in this record is whether this Court would reach the same result as the district court and Eighth Circuit in a similar application of the *Haslip* standards to the facts here, the questions raised in NAPB's Petition have no precedential implications. No reason exists for delaying further the implementation of the judgment in this case.

STATEMENT

NAPB's lack of candor with this Court in its Petition for a Writ of Certiorari echoes its lack of candor with the

Plaintiffs in 1983 and 1984. NAPB has turned the record inside out and upside down in its effort to mislead this Court into thinking that a question for review exists. It classifies this case as "relatively minor commercial disputes" (Pet. 3); however, the jury awarded the Plaintiffs more than $1 million dollars in out-of-pocket loss damages for NAPB's fraud. NAPB minimizes its fraud by asserting that its fraudulent concealment lasted only from March to July 1984 (Pet. 4, 8); however, the jury could find that the fraudulent concealment lasted from April 11, 1983 to July 1984. Pet. App. 28A, 44A. NAPB asserts that the jury instructions allowed the jury to award punitive damages based upon the wealth of Royal Dutch/Shell (Pet. Question 3); however, the jury instructions show this assertion is untrue. SA 11. NAPB avers that the post-verdict review was not under the standards of procedural due process approved in *Haslip* (Pet. Question 1); however, this is also untrue in view of the probing review of the jury award under the *Haslip* standards by the district court and the Eighth Circuit. Pet. App. 1A-19A, 36A-51A. Similar misrepresentations led the district court to criticize NAPB when ruling on post-trial motions: " . . . [D]efendant presents the evidence in the light most favorable to it, rather than in the light most favorable to the jury's verdict." Pet. App. 28A. NAPB's misrepresentation of the record on appeal led the Eighth Circuit to comment: "Nickerson mistakenly seizes upon various fragments in the district court's opinion and asserts that the district court applied an overly malleable standard to satisfy the requirements of due process." Pet. App. 17A.

This case involved contract and fraud claims by ten family-owned soybean seed companies, referred to as Agripro Associates, against NAPB. The ten Associates marketed soybean seed through their own dealer organizations in the states of Iowa, Illinois, Indiana, Minnesota, Nebraska, South Dakota, Kansas, Missouri, Michigan, Ohio, and Kentucky.

The Agripro brand name and the Agripro Associate method of marketing soybean seed were developed in 1973. Agripro, Inc. did the research and development of foundation soybean seed which they sold to the Agripro Associates. Every spring the Associates purchased and planted foundation seed, harvested the resulting soybean crop in the fall, and cleaned and conditioned the seed in the Associates' own seed plants during the winter. Thus, the Associates turned the foundation seed into commercial soybean seed which the Associates sold to farmers through their own dealer organizations.

NAPB, a partnership owned equally by the Royal Dutch/Shell Companies and Olin Corporation, purchased Agripro, Inc. in 1976. Before the purchase was finalized NAPB established a relationship of trust and confidence with each Associate. NAPB recognized that the Associates and their farmer dealer organization were responsible for the excellent reputation of Agripro soybean seed. NAPB described its relationship with the Associates as "partners," a "working marriage" and "family." It assured the Associates that there would be no change in the Associate system.

NAPB prepared and distributed to the Associates written Agripro Associate Policies. These policies provided in part that: "NAPB will keep the Agripro Associates informed on all matters relevant to the Associate program . . . " Exhibit 32 JA 301. The policies also assured the Associates that all information furnished NAPB would be kept in the strictest confidence.

From July of 1976 through June of 1984, NAPB continually reaffirmed its agreement and represented that (1) the Associates would be kept informed of all matters that affected their relationship with NAPB and that (2) Agripro soybean seed would be marketed exclusively by the Associates, not by NAPB or its dealers.

Warren Melles became president of NAPB in early 1983. Prior to Melles' employment there was no consideration given to terminating the Agripro Associate program. However, on April 11, 1983, NAPB's board of

directors secretly decided to terminate the Associates and to aggressively sell Agripro soybean seed through its own direct dealers and through dealers they planned to steal from the Associates. Exhibit 67 JA 497-498. NAPB launched a clandestine scheme to acquire the Associates' sales of Agripro soybeans and to steal their dealer force. By eliminating the Associates, NAPB could increase its share of the profits from Agripro soybean sales by an estimated $10 million and take over the Associates' 4,000 dealers.

John Parke, a consultant, was hired by NAPB to orchestrate the scheme. He visited the Associates in order to acquire information on their operations. In a written report, Parke bragged to NAPB President Melles about the "cover story" he used to conceal his true purpose. The Associates gave Parke complete access to confidential business information as they had no inkling the information was going to be used by NAPB to compete against them.

Parke met secretly with key NAPB officials under the code names "Brand Positioning" and "Parke Project." During the meetings, NAPB managerial employees advised Bruce Rydeen, NAPB's director of marketing, that there had been prior promises made to the Associates regarding their exclusive right to market Agripro soybeans. Verle Wathen, NAPB's regional sales manager, questioned whether competing with and then terminating the Associates was right. He repeatedly pointed out the promises that NAPB's presidents had made. Others voiced adamant concern. Members of the committee questioned whether discontinuing the Associate system was legal. Committee members argued that the decision wasn't morally or ethically right. One NAPB official wrote to President Melles that his biggest concern for 1984 was "legal implications of cutting off the Associates and *stealing* their dealer force." Exhibit 72, JA 564, 573. [Emphasis added.]

At a December 1983 Parke Committee meeting, the Associates' dealer names were a major topic. Verle Wathen reported how "touchy" the Associates were about the identity of their dealers. NAPB asked Chuck Stephens, its advertising manager, to check Associate Schettler's dealer list. Stephens didn't think this was an ethical thing to do. NAPB tried to get the dealer names by offering to help boost Associate sales through identifying their key dealers. Charlie Jackson testified at trial how he lied to obtain dealer names.

Risks of the strategy were assessed in January of 1984. NAPB identified two risks in a written memorandum: (1) There will be litigation and (2) "How big is the dollar risk? How deep is Shell's pocket?" Exhibit 1068, JA 582.

Wathen told Russ Welty, an NAPB employee, to obtain "discreetly" a list of Associates' dealers. Welty was proud that he had gained the trust and confidence of the Associates, but now he was being asked to betray the Associates. Believing he was being directed to be dishonest, he refused the assignment and was fired.

On April 10, 1984, one year after the initiation of its clandestine scheme, NAPB signed a contract with Jim Coomer to *become* an Associate. NAPB had directed that there be no leaks regarding the termination of the Associate program. In signing the contract with Coomer, NAPB's national sales manager Thompson said he "bastardized" himself and knew the company misled Coomer in signing the contract. Thompson had discussed the Coomer contract with NAPB's legal counsel and corporate officers beforehand.

During the scheme, NAPB continued to say that only Associates would sell Agripro soybeans. NAPB wrote to all the Associates in November 1983 stating that only the listed Associates could produce and market Agripro soybean varieties. NAPB's corporate attorney wrote to Latham's attorney in February of 1984 stating, "Allow me to reinforce the fact that only Agripro Associates . . . are

legally empowered to offer for sale or sell Agripro products." NAPB continued to assure Associates that they would be kept currently informed on all matters. Melles told Latham in December of 1983, "If, in fact, we make a significant change, I will tell you personally when the time is right." Melles conceded, however, he did not tell Latham about the study that had been undertaken regarding brand positioning. Nor did he tell Latham about the secret decision to eliminate the Associates.

NAPB had numerous opportunities to disclose its change in policies and its decision to terminate and compete with the Associates. Melles and other NAPB officials met with the Associates in June 1983 to discuss objectives and challenges for NAPB, but the planned elimination of the Associate program was not discussed. NAPB took Associates to England in the summer of 1983 to visit Nickerson Seed Company, Shell's U.K. subsidiary; the Royal agricultural show; and Royal Dutch Shell's London headquarters. NAPB told the Associates how important they were to NAPB and to Shell. They were not told of NAPB's secret plan to terminate them and take over their dealers and sales of Agripro soybeans. NAPB held its Soybean Seed Sales Schools in September 1983. Again, NAPB did not disclose that it would be competing with the Associates for 1984 sales. In December of 1983, the Associates met in Chicago with Melles who led them to believe the Agripro Associate Program would continue without change. In the winter of 1983, NAPB's area sales representatives told Associate Ohio Grain it had nothing to worry about. In March, 1984, national sales manager Thompson told Ohio Grain that NAPB was committed to the Agripro program.

NAPB's plan was to keep the Associates in the dark: " . . . [W]e should only say what is absolutely necessary to our Agripro soybean associates, . . . [D]on't inform them that 1985 will be the last year that we will sell registered seed, but wait until spring of 1985 to tell them. Doing so will give us an additional 6 months to get our program implemented and settled . . . It does not change

our strategy any, but it may help us hold more of the associate business without tipping our hand to them ahead of time." Exhibit T-3268, JA 632. NAPB employees were warned to follow all scripts and that "loose lips sink ships." Meanwhile, the Associates continued to share their business plans with NAPB, and NAPB responded that it would treat the information as "confidential." The Associates' first knowledge of NAPB's plan came in July 1984, sixteen months after the scheme was conceived, when NAPB implemented the plan by terminating the Associate program and commencing fierce competition with the Associates.

The sudden termination of the Associates when they had soybeans in the ground, which they would now be selling in competition with NAPB, was devastating. At NAPB's encouragement, Latham's 1984 seed stock order was the largest NAPB had ever received. Associate Sheppard immediately lost dealers representing half of his sales. Associate Shockney had 10,000 bags which he could not sell. Regarding NAPB's competition, Shockney was in a typical predicament: "It left me in an astonishing situation where I had a warehouse full of the competition's seed beans, and I didn't know whether to sell them or what to do with them, because if I sold them, why, I was helping the competition. If I didn't sell them, it would hurt me financially. So it was a no-win situation." Tr. 2491. Prior to terminating the Associates, NAPB raised the seed stock prices paid by the Associates and increased their royalty rates. When NAPB did go into competition with the Associates, it substantially underpriced the Associates on the Agripro soybeans which the Associates had for sale. NAPB developed a new logo and line of packaging for its direct marketing of Agripro soybeans. The Associates were forced to use the old bags.

NAPB used the Associates' confidential information including the type of soybean seed sold, the amount of soybean seed sold, and the geographic area where the soybean seed was sold. NAPB prepared maps of the

Associates' trade areas to aid NAPB's salesmen in aggressively taking the Associates' Agripro soybean seed business.

This is what the jury could find from the record. NAPB pretends that this record does not exist. But this is the record on which compensatory and punitive damages were awarded by an Iowa jury, which the experienced trial judge described as one of the most conscientious he had ever worked with (Pet. App. 27A). This is also the record reflected in the facts recited by the district court in its ruling on post-trial motions (Pet. App. 20A-35A), the district court's recitation of the facts in its order on remand (Pet. App. 36A-51A), and the court of appeals' recitation of the facts in its opinion (Pet. App. 1A-19A). As this Court can see, NAPB has continued to ignore and deny the evidence the jury found to be true.

REASONS FOR DENYING THE WRIT

1. BECAUSE THIS CASE WAS REVIEWED UNDER THE *HASLIP* STANDARDS, NO QUESTION IS PRESENTED REGARDING WHETHER LESSER STANDARDS WOULD COMPLY WITH DUE PROCESS.

This case was reviewed by the district court and the Eighth Circuit under the *Haslip* standards. Petitioner misleads this Court when it claims that the post-verdict review was conducted under only the "shocks the conscience" and the "passion and prejudice" standards. NAPB misdirects the Court by focusing only on the trial court's initial post-trial ruling (Pet. App. 20A-35A)[3] made in 1990, prior to *Haslip*. NAPB does not address the district court's second, meticulous post-*Haslip* review

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[3] This ruling was made Aug. 2, 1990 prior to the approval of due process standards by this Court in *Haslip* which was decided March 4, 1991.

(Pet. App. 36A-51A)[4] of the punitive damage awards made after the Eighth Circuit's remand order in 1991. NAPB even omits from its appendix the Eighth Circuit order (SA 1-3) which remanded this case for the specific purpose of conducting a post-verdict review using the standards approved by this Court in *Haslip*. In typical fashion, NAPB has selected "fragments" of the decisions to support its arguments.[5] For example, NAPB quotes a portion of the court of appeals' decision to suggest that the court of appeals reviewed the punitive damage award solely under the "passion and prejudice" tests afforded by state law. NAPB's quotation (Pet. 13-14) stops mid paragraph and omits the Eighth Circuit's central conclusions:

> Indeed, the district court's additional scrutiny of the award under the seven *Haslip* factors[6] helps to ensure that the jury's verdict satisfied due process requirements. We find the district court's reasoning persuasive, and we affirm its conclusion that the award of punitive damages did not violate constitutional standards.

Pet. App. 17A

No due process question is presented under the record in this case. NAPB received all of the due process protections approved in *Haslip*. NAPB cannot establish any deficiencies in the process followed in awarding and reviewing punitive damages. NAPB is merely engaged in

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[4] This order was filed on September 30, 1991, after *Haslip*, and satisfied the mandate of the order of the court of appeals entered June 21, 1991 to review the punitive damage awards under the standards set forth by the Supreme Court of the United States in *Haslip*. See SA 1-3.

[5] The same practice by NAPB was criticized by the court of appeals. Pet. App. 17A.

[6] The Eighth Circuit Court of Appeals remarked upon the district court's thorough review of the award under the seven factors used by Alabama courts and approved in *Haslip*. Pet. App. 16A.

one last desperate attempt to upset the jury verdict. Due process does not exist to guarantee that litigants will be satisfied with fair, but unfavorable, decisions.

In *Haslip*, this Court approved procedures which imposed a triple constraint on the discretion of the jury through (1) adequate instructions, (2) post-trial review by the trial court, and (3) appropriate review by the appellate court. 111 S.Ct. at 1044-46.

This jury was constrained by proper instructions.[7] NAPB had the benefit of review at the trial court level by William C. Hanson, a seasoned trial judge with over 37 years judicial experience. Judge Hanson subjected the jury's award of punitive damages to the type of searching and exhaustive review which was approved in *Haslip*. In addition, the awards were reviewed to ensure their compliance with the state standards. This scope and intensity of review far exceeded the procedures found to be sufficient in *Haslip*.

The panel of the Eighth Circuit which also upheld the award after scrutiny under the *Haslip* standards included Senior Judge Donald P. Lay, then Chief Judge of the Eighth Circuit, Paul H. Roney, senior judge and former Chief Judge of the Eleventh Circuit, and Roger L. Wollman, circuit judge and former Chief Justice of the Supreme Court of South Dakota. The courts that have reviewed the punitive damage awards have competently, thoroughly and adequately applied the mandates of the Due Process Clause as interpreted by the Court in *Haslip*.

The initial post-trial review of the punitive damage awards was conducted by Senior Judge Hanson. Although the trial was held prior to the *Haslip* decision, the district court applied the Eighth Circuit's decision in *Davis v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 906 F.2d 1206 (8th Cir. 1990), which anticipated the due process constraints that the Supreme Court would adopt in *Haslip*. Pet. App. 33A.

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[7] See discussion of jury instructions, Question 3, *infra* p. 20.

The appeal was submitted to the Eighth Circuit three months after the *Haslip* decision. In order to ensure that NAPB received the full benefit of all the procedures approved in *Haslip*, the Eighth Circuit remanded to the district court for review of the punitive damage awards under the seven objective standards approved in *Haslip*. SA 2-3.

Pursuant to the remand from the Eighth Circuit, the district court performed an exhaustive fact-intensive evaluation of the reasonableness of the punitive damage award consistent with the *Haslip* procedures.[8] After review, the district court found that the awards were reasonable and met the due process standards approved in *Haslip*. The district court was in the best position to make this review, since it had firsthand knowledge of the evidence and was in a position to evaluate the credibility of the witnesses and their evidence and could observe whether the jury was affected by passion or prejudice or was attentive, diligent and conscientious. This second post-trial review subjected the punitive damage awards to careful scrutiny under the *Haslip* standards to ensure that the awards had a reasonable relationship to NAPB's wrongful conduct, the harm done by NAPB, and to the purpose of discouraging similar conduct by others. NAPB's rights to due process were fully protected.

The Eighth Circuit protected NAPB's right to due process by further ordering that the parties file additional briefs setting forth their positions concerning the district court's supplemental findings and conclusions on the punitive damage issues and due process. SA 14. The court of appeals undertook its own rigorous and thorough review of the record and concluded that NAPB's rights to due process had been protected[9].

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[8] The district court placed no limits on the parties' briefs and arguments. SA 12-13.

[9] The Eighth Circuit deliberated for over one year before concluding that the punitive damages awarded against NAPB

NAPB cannot fairly claim that the court of appeals' decision treated *Haslip* as having imposed "no meaningful due process limitations" on the award of punitive damages. The Eighth Circuit plainly accepted and applied the *Haslip* standard even though the court recognized that *Haslip* did not necessarily establish a minimum standard of due process. The district court and the court of appeals thus not only applied the state court standards, but also reviewed and approved the award under the objective criteria approved in *Haslip*. State court standards were applied as an additional safeguard and not as a substitute for the *Haslip* factors. Since both the district court and the court of appeals made the type of independent, searching review of the record that was approved in *Haslip*, certiorari in this case should be denied. No question is presented under this record concerning whether a lesser standard would comport with due process.

2. BECAUSE THE JURY CONSIDERED ONLY EVIDENCE OF WRONGFUL CONDUCT WHICH WAS RELEVANT TO NAPB'S FRAUD AND MALICE, NAPB'S SECOND QUESTION LACKS RECORD SUPPORT AND HAS NO MERIT.

In urging its second question as a basis for certiorari review, NAPB contends the district court and Eighth Circuit should have limited their consideration to NAPB's conduct during a four-month period in 1984, ignoring the broad landscape of NAPB's reprehensible conduct starting a year earlier.[10] In other portions of its Petition, NAPB

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were proper and that NAPB had been afforded all of the due process rights and procedures which this Court had approved in *Haslip*. The decision was unanimous. No Eighth Circuit Judge supported NAPB's Petition for Rehearing with Suggestion for Rehearing *En Banc*.

[10] The district court addressed this argument in its ruling on post-trial motions holding that NAPB's plan to steal the

contends that the record received too little scrutiny. Here, it complains that it received too much.

The district court submitted four claims of fraud to the jury.[11] For any of the claims to be sustained, the Plaintiffs were required to prove all eight fraud elements listed in Instruction No. 38. The ten jurors unanimously found that NAPB had fraudulently concealed its intention to terminate the Associates and to market Agripro brand soybeans in competition with them.[12] The jury found against Plaintiffs on their other three fraud claims, but the record does not disclose what fraud elements on those claims the jury found were not proven. The failure

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Plaintiffs' dealers and to conceal their intentions related to NAPB's actual motivations and concerns. The jury was entitled to consider this evidence in assessing punitive damages. Pet. App. 30A n. 5.

[11] See the special verdict form which sets forth the four fraud claims submitted to the jury. SA 5.

[12] Iowa, Michigan, Ohio and Indiana have all adopted Restatement (Second) of Torts, §551 which imposes liability for nondisclosure in business transactions. Decisions in these states supporting the duty of disclosure to avoid a fraudulent misrepresentation include *Air Host Cedar Rapids, Inc. v Cedar Rapids Airport Commission*, 464 N.W.2d 450, 453 & 454 (Iowa 1990); *Sinnard v. Roach*, 414 N.W.2d 100, 105 (Iowa 1987); *Cornell v. Wunschel*, 408 N.W.2d 369, 374 (Iowa 1987); *Nie v. Galina State Bank & Trust Co.*, 387 N.W.2d 373 (Iowa Ct.App. 1986); *Sedco International, S.A. v. Cory*, 522 F.Supp. 254 (S.D. Iowa 1981), aff'd *Sedco International., S.A. v. Cory*, 683 F.2d 1201 (8th Cir. 1982), *cert. denied*, 459 U.S. 1017, 103 S.Ct. 379, 74 L.Ed.2d 512 (1982); *U. S. Fidelity and Guaranty Co. v. Black*, 313 N.W.2d 77, 88 (Mich. 1981); *Strand v. Librascope, Inc.*, 197 F.Supp. 743, 744 & 754 (E.D. Mich. 1961); *Miles v. McSwegin*, 388 N.E.2d 1367 (Ohio 1979); *Central National Bank of Greencastle v. Shoup*, 501 N.E.2d 1090 (Ind. Ct.App. 1986); *Thompson v. Best*, 478 N.E.2d 79 (Ind. Ct.App. 1985); *Indiana Bank and Trust Co. of Martinsville, Indiana v. Perry*, 467 N.E.2d 428 (Ind. Ct. App. 1984). The development of the common law of fraud in these states is a particularly inappropriate area for this Court's intervention.

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of proof on these claims is far from a finding of "not guilty" as asserted by NAPB. Pet. 19. NAPB's conduct was a seamless whole, and the same evidence was relied on by Plaintiffs to prove all of their claims.

NAPB deceives the Court by claiming that the review of punitive damages was based only on *claims* for which it was found not guilty. The truth is that the evidence examined in the post-trial *Haslip* review was relevant to the fraud of which NAPB was guilty. The jury had been instructed to consider all reasonable inferences that could be drawn from the facts and circumstances in determining whether NAPB intended to deceive the Associates by fraudulently concealing its intention to terminate the Associates and to compete with them.[13] Since evidence of fraudulent intent is seldom direct, all of NAPB's *conduct* was relevant to the *claim* of fraud upon which NAPB was found guilty[14] In deciding whether to award punitive damages the jury was instructed to consider NAPB's *conduct* in determining whether the claim of fraud for which NAPB was guilty was committed with legal malice. The conduct reviewed below was all relevant to the scheme which NAPB fraudulently concealed. The evidence showing why and how this fraud was perpetrated was also plainly relevant in supporting the jury finding that NAPB committed the fraud with legal malice. In contending otherwise, NAPB continues its pattern of denial, refusing to view the evidence in its light most favorable to the verdict as required by the applicable standard of review.

The Eighth Circuit reviewed some of the relevant evidence in holding that NAPB's malicious conduct justified the punitive damages:

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[13] NAPB did not object to that instruction, number 43, nor does it challenge here the jury's finding that this competition was in breach of contract.

[14] Fed. R. Evid. 401, 402.

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> In addition, the record is replete with examples of conduct on Nickerson's part that support the award of punitive damages. For example, Nickerson used various ruses to procure the Associates' dealer lists to facilitate its undisclosed plan to recruit the Associates' dealer customers. Nickerson asked its advertising manager, Chuck Stephens, to covertly check Associate Schettler Seed Farm's dealer list, despite his ethical reservations. Nickerson management suggested that its salesmen obtain the dealer lists by offering to help boost Associate sales through identifying their key dealers. One salesman, Charles Jackson, testified that he lied to obtain access to old advertisements containing dealer names. Another salesman, Russell Welty, expressed reservations about, as he put it, betraying the Associates' trust by getting the dealer names. Welty's refusal to betray that trust was one of the reasons that gave rise to his being terminated by Nickerson. Taking all of this into account, we find no abuse of discretion in the district court's assessment that the punitive damages awards were not improper.

Pet. App. 14A. The district court recounted NAPB's reprehensible conduct in much greater detail in its initial ruling (Pet. App. 28A-30A) and in its review after remand. Pet. App. 43A-46A.

NAPB's ruses to obtain Associate dealer lists were integral to its dishonest scheme to terminate the Associates and then use the dealer lists to compete with them. Pet. App. 43A. Contracting to add Coomer as a new Associate at a time when NAPB was hiding its intention to terminate the Associate system was another relevant component in the deception. Pet. App. 43A. As observed by the district court in its review after remand, "The jury could have concluded that defendant intended to destroy the associates' businesses, to acquire all the associates' Agripro soybean seed sales, and to use the dealers which the associates had established." Pet. App. 44A.

NAPB's nefarious scheme and the fraudulent concealment of its secret plans involved wrongful conduct over a period of more than a year which NAPB's own employees described as a "cover story", a "decision that wasn't morally or ethically right", "stealing", "unethical", "lies", "betrayal of trust", "dishonest", "bastardizing", and "misleading". NAPB's malicious conduct is examined at length by the district court and court of appeals. Pet. App. 14A, 28A-31A, 43A-45A, 49A-51A.

NAPB attempts to rewrite the record in contending that the only tortious conduct it committed was " . . .its delay from March to July 1984 in informing plaintiffs of its decision to change marketing systems." Pet. 18. However, the district court held the jury could find that NAPB commenced its fraudulent conduct in April of 1983. Pet. App. 44A. After the remand, the district court stated:

> This was not a situation where a sudden change in the marketplace forced defendant to change its marketing plans. Defendant commenced a long and exhausting process of planning and analysis to prepare NAPB to acquire the associates' businesses, their dealers, and to compete directly with them.
>
> Concealing its decision prevented plaintiffs from preparing for the change. For this reason, the duration of the fraud was particularly damaging.

Pet. App. 45A.

The jury actually found that for 16 months NAPB " . . . fraudulently concealed its intention to terminate the associates and to market Agripro brand soybeans in competition with them."[15] In this fraud case, *all* of NAPB's wrongful conduct towards the Associates was relevant

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[15] The jury also found that Agripro breached its contract with the Plaintiffs when it "Sold Agripro soybeans in direct competition in breach of contract." and "Failed to disclose all relevant matters in breach of contract." See special verdict form. SA 4-6.

and material to the issues of liability and punitive damages. Due process requires that the jury and the reviewing courts consider the entire record of the Defendant's conduct. *Haslip*, 111 S.Ct. at 1045. NAPB's claim to the contrary is without merit.

3. BECAUSE THE INSTRUCTIONS LIMITED THE JURY TO CONSIDERATION OF THE FINANCIAL CONDITION OF NAPB IN AWARDING PUNITIVE DAMAGES, NAPB'S QUESTION ALLEGING THE INSTRUCTIONS ALLOWED THE WEALTH OF THIRD PARTIES TO BE CONSIDERED IS UNFOUNDED.

NAPB's due process rights were protected by the district court's jury instructions which mirror the instructions approved in *Haslip*. NAPB denies the plain meaning of Instruction No. 54 when it contends that the instruction allowed the jury to assess punitive damages based upon the wealth of Royal Dutch/Shell, a remote parent company of NAPB. The court instructed the jury to consider *only* the financial condition of NAPB and *not* to consider the condition of any other company. SA 11. There is absolutely no record support for NAPB's assertion that the jury considered the financial condition of any of NAPB's parent companies. This claim is a total fabrication.

Instruction No. 54 contained all of the restraints upon the jury's discretion[16] which this Court found sufficient in *Haslip*. As a further protection, Instruction No. 54 limited the jury's discretion in awarding punitive damages to:

> The amount of punitive damages which will punish and discourage like conduct by the opposing party in view of its financial condition (in considering this criteria you may only consider the financial condition of defendant NAPB

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[16] See the entire instruction on punitive damages. SA 9-12.

> and not the condition of any other company you have heard mentioned in the trial).

SA 11.

The district court's Instruction No. 54 was proper in light of the *Haslip* decision and sufficiently restrained the jury's discretion in the award of punitive damages. The instruction was more extensive and restrictive than the instruction approved in *Haslip*. The court of appeals carefully examined the punitive damages instruction and the laws of Iowa, Ohio, Indiana and Michigan, and found that: " . . . the instruction adequately explained the law and that the jury properly followed the instruction." Pet. App. 11A.

Another example of NAPB's pattern of misstating the facts by combining unrelated incidents is its claim that Plaintiffs "urged the jury to assess punitive damage based upon the wealth of Royal Dutch/Shell, NAPB's remote parent company." NAPB asserts that Plaintiffs argued that:

> ' . . . you people have a pretty good handle from the testimony . . . what kind of multi-national companies we deal with in this case, and you can make the [punitive damages] decision on that.' (Argument Tr. 232) and that in assessing punitive damages the jury should consider 'how deep is Shell's pocket?' (Argument Tr. 71)

Pet. 7

The comment in closing arguments concerning NAPB being a "type of multi-national company"[17] meant literally that. NAPB was a multi-national company. During most of its history, it was a partnership consisting of Nickerson Seed Company of England and Olin Corporation of the United States. Many of NAPB's officers and

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[17] It should be noted that this comment which NAPB complains of appears 161 pages later in the transcript than the first comment NAPB complains of. The only relationship between the two comments is they occurred on the same day, albeit 7 hours apart.

directors were citizens of another nation. NAPB called witnesses from England and Switzerland to testify about its business practices.[18]

Plaintiffs never argued that the jury should assess punitive damages based upon the wealth of Royal Dutch/Shell. Instruction No. 54 prohibited any consideration of the financial condition of any other company mentioned in the trial. NAPB's claim to the contrary is groundless.

The reference to Shell's pocket is a quote from NAPB's own document (Exhibit 1068, JA 582), which went into evidence without objection. These handwritten notes of an NAPB official were made during a secret meeting on January 19, 1984, during which NAPB officials discussed the risks of being sued and the size of the dollar risk. NAPB's officer's note, "How deep is Shell's pocket?" reflected his analysis of that risk. This phrase was coined by NAPB's own officers and reflected NAPB's realization that its fraudulent conduct exposed it to an enormous financial risk if there was litigation.

Plaintiffs used Exhibit 1068 in closing argument to show the deliberate nature of the fraud and the fact that NAPB's officers had contemplated the enormity of the dollar risk from their fraudulent conduct. NAPB considered litigation to be a cost of its fraudulent scheme and it had decided that the financial cost of getting caught was

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[18] The district court in responding to a similar complaint made in NAPB's post trial motions stated:

> Defendant's relationship with Shell Oil Company (Shell) was brought to the attention of the jury by both parties. Several relevant documents referred to Shell and defendant chose to have persons associated with Shell act as some of its key witnesses. The court did instruct the jury that in setting any punitive damages award it could only consider the financial resources of defendant, and not of any other companies mentioned during the trial.

Pet. App. 31A n. 7.

a risk it could afford. The final arguments urged the jury to punish NAPB for its conduct. No one requested, nor did the district court allow the jury to punish NAPB based on the wealth of Shell Oil Company.

NAPB falsely claims that the jury had *no evidence* of NAPB's financial condition. The district court's analysis of this *Haslip* factor found:

> NAPB planned to increase its margin on Agripro soybeans from $.95 royalty fee to $2.75 per unit by implementing this plan. At the March 1984 sales level of one million bags of Agripro, this amounted to $1.8 million per year of additional profit, or $10 million[19] in five and a half years.

Pet. App. 46A-47A.

> . . . [O]ther evidence of the financial condition of defendant introduced at trial shows the award is not excessive. This includes defendant planned to increase its Agripro profit margin by $1.80 per unit, defendant's projected 1985 revenues were $78.9 million, and 1990 revenues were $164.9 million.
>
> Finally, there is no doubt that the evidence clearly shows that almost from the date of purchase defendant represented itself as fully able and willing to support any financing necessary and incidental to producing a superior soybean seed.

Pet. App. 47A-48A.

Moreover, the district court found that other evidence of NAPB's financial condition in the record would allow the jury to believe the Defendant had a net worth far in excess of the punitive damage assessed. The district court noted:

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[19] The Court of Appeals noted that, "There is testimony in the record that Nickerson realized approximately $10 million from discontinuing the associate program." Pet.App. 14A. This evidence came from NAPB's own document (Exhibit 234, JA 502-5), not the oral testimony.

> Further, attempts by plaintiff to show defendant's condition was resisted at every step in the proceedings. *The plaintiff has made a prima facie case regarding the financial condition of the defendant, and there has been a minimum of evidence by defendant to disprove the premise.* If this defendant sought to prove poverty, it should have moved forward. It chose not to do so. [Emphasis added]

Pet. App. 48A n 3.

The court of appeals observed that Defendant was aware that punitive damages would be submitted and had the opportunity to introduce its net worth statement into evidence if it was concerned that its relationship with the Royal Dutch/Shell organization would lead the jury to conclude its resources were greater than they were. The court of appeals found NAPB's arguments to be without merit. Pet. App. 12A. None of the states involved require evidence of Defendant's net worth as a condition to the award of punitive damages. The simple fact is that there was substantial evidence of NAPB's financial condition in the record. The only thing not in the record was NAPB's purported statement of net worth, something which not even NAPB was prepared to offer into evidence.[20] Had NAPB sought to inform the jury of its alleged net worth, it would have been required to prove that its net worth statement was accurate. NAPB's claim that its net worth is only $48 million *is nothing more than a claim.* It is not a part of the trial record, its accuracy

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[20] Prior to trial, NAPB had exchanged its assets for shares in another company. During trial, NAPB existed only as an empty corporate shell with no business operations or activities. Plaintiffs did not believe that NAPB's net worth statement was accurate, nor did they have any independent means of verifying NAPB's net worth.

has never been tested or established, and the claim should not be considered by this Court[21].

NAPB did not preserve the issue that it would be prejudiced if it were required to offer evidence of its net worth, as that might be viewed by the jury as a concession of liability.[22] Had these concerns been raised at the district court level, prejudice could have been avoided by an appropriate instruction, by bifurcating the issues of the right to recover punitive damages from the amount of the recovery[23], by requesting a stipulation, or by other means.

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[21] *Haslip* was decided with reference to Alabama law which precluded introduction before the jury of evidence of financial condition, while permitting the trial court and the appellate court to go beyond the record and consider such evidence in the appeal. None of the applicable states in this case would permit the consideration of evidence which was not presented to the jury.

[22] NAPB's reliance upon *Adams v. Murakami*, 284 Cal.Rptr. 318, 813 P.2d 1348 (Cal. 1991) is misplaced for two reasons - (1) the California Supreme Court based its decision upon an expression of California public policy, not on constitutional grounds, "We need not decide, and do not decide, whether evidence of a defendant's financial condition is a *constitutional* prerequisite under *Haslip* . . . " Id. p. 1356; and (2) none of these states require the Plaintiffs to put Defendant's net worth into evidence as a condition to the recovery of punitive damages. *Hibschman Pontiac, Inc. v. Batchelor*, 362 N.E.2d 845, 849 (Ind. 1977); *Peisner v. Detroit Free Press*, 242 N.W.2d 775, 780 (Mich. Ct.App. 1976); *Hall v. Montgomery Ward & Co.*, 252 N.W.2d 421 (Iowa 1977); *Wagner v. McDaniels*, 459 N.E.2d 561 (Ohio 1984); *Arlington State Bank v. Colvin*, 545 N.E.2d 572, 581 (Ind. Ct.App. 1989). The trial court distinguished *Adams*. Pet. App. 48A n. 3.

[23] Before trial, Judge Hanson had raised the possibility of bifurcation of liability from damages and discussed the question of bifurcation often during trial (Tr. 612, 700, 1487-88, 3794). Defendant did not want bifurcation (Tr. 1487). Bifurcation is one of the protections which Justice O'Connor recommended in *Haslip*, 111 S.Ct. at 1064.

NAPB's third question does not present any issue appropriate for a grant of certiorari.

4. BECAUSE THE PUNITIVE DAMAGE AWARDS WERE PROPORTIONAL TO THE WRONGFUL CONDUCT AND RESULTING HARM, NO DUE PROCESS ISSUE IS RAISED BY THE SIZE OF THE PUNITIVE DAMAGE AWARDS, AND THE FOURTH QUESTION HAS NO MERIT.

The jury's award of punitive damages is proportional to the injury inflicted and has a reasonable relationship to the compensatory damages awarded under the standard approved in *Haslip* and faithfully followed by the district court and the court of appeals.

In *Haslip*, Cleopatra Haslip had out-of-pocket losses of less than $4,000 which were included in a request for compensatory damages of $200,000. The *Haslip* jury returned a general verdict for her in the amount of $1,400,000 which did not differentiate between punitive damages and economic or non-economic compensatory damages. Depending on one's speculation as to the amount of compensatory damages, the ratio of punitive damages to compensatory damages in that case is anywhere between 4.2 to 1 to 259 to 1.[24] In contrast, the ratio of punitive damages to *purely economic damages* in this case is 9 to 1.

Ratios of punitive damages to actual damages are not controlling in determining whether a punitive damage award is excessive, especially when only purely economic damages are involved. These Plaintiffs were limited to

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[24] "We are aware that the punitive damages award in this case is more than 4 times the amount of compensatory damages, is more than 200 times the out-of-pocket expenses of respondent Haslip. . . . We conclude, after careful consideration, that in this case it does not cross the line into the area of constitutional impropriety." *Haslip*, 111 S.Ct. at 1046.

the recovery of out-of-pocket losses which the jury calculated to the penny.[25] Substantive due process cannot be judged solely by ratios of punitive damages to actual damages because "[a]n inflexible mathematical ratio which focuses on the plaintiff's injuries rather than the wrongful acts of the defendant fails to accomplish the policy objectives of punishment and deterence . . . " *Ryan v. Arneson*, 422 N.W.2d 491, 496 (Iowa 1988); " . . . [L]egal precedent is of limited value in evaluating the amount of punitive damage awards in individual cases." *Johnston v. Norfolk Southern Corp.*, 448 N.W.2d 486, 489 (Iowa 1989).[26] This Court approved the Alabama system of post-verdict review in *Haslip* because it "ensures that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." 111 S.Ct. at 1045. The same standards were met here.

This case is truly unique because all claims for actual and punitive damages which could ever be assessed against NAPB due to its fraudulent conduct were submitted to a single jury. Once that jury determined that $10 million was the appropriate amount to punish NAPB, the allocation of the damages among the Plaintiffs could not be prejudicial to NAPB. The fraudulent conduct was the

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[25] Compare these verdicts to cases where the damages are for non-economic loss such as pain and suffering, disfigurement, mental anguish, damage to reputation etc.

[26] The Eighth Circuit has also stated that legal precedent is of limited value in determining whether an award is excessive. The Court stated: "such comparisons are not greatly helpful because each case must be evaluated as an individual one, within the framework of its distinctive facts". *Vanskike v. Union Pacific R. Co.*, 725 F.2d 1146, 1150 (8th Cir. 1984). This Court has wisely adopted the rule that defendants can best be protected against excessive punitive damages through procedures that protect due process under *Haslip* rather than by a bright line test which achieves simplicity at the expense of individualized assessment of punitive damages.

same to all of the Plaintiffs and was equally directed towards stealing their dealers and destroying their businesses. Thus, an equal division among the Plaintiffs is proportionate to the wrongful conduct and the harm intended. The only parties who could claim to be prejudiced by the jury's division of the punitive damage award are the Plaintiffs themselves. The court of appeals observed that

> . . . each plaintiff suffered from the same fraudulent conduct on Nickerson's part. The actual damages varied only because of the size of the associate. There is testimony in the record that Nickerson realized approximately $10 million from discontinuing the associate program.

Pet. App. 14A. Because NAPB's wrongful conduct toward each Associate was exactly the same and the intended harm, stealing their dealers and destroying their businesses, was the same for each Associate, equal punitive damages were proportional and reasonably related to injury. Although the smaller Associates may have proven smaller losses, NAPB's scheme caused them much greater relative harm since they were less able to withstand cutthroat competition from their former "partner," NAPB.

The measure of compensatory damages available to these Plaintiffs was the same for breach of contract and fraud[27]. NAPB's assertion that the jury awarded the damages for breach of contract rather than for fraud has no basis in the record. Upon review of the verdict, the courts must presume that all of the undifferentiated damage award was for fraud. In a fraud case, the award of economic damages imposes no real punishment whatsoever.[28] A verdict for fraud damages merely returns to the Plaintiffs the losses which are proven to be the direct

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[27] Instruction No. 48 permitted the jury to award damages equal to the benefit of Plaintiffs' bargain had no contract breach or no fraud occurred. Instruction Nos. 47 and 48, SA 7-9.

[28] *Walker v. Sheldon*, 223 N.Y.S. 488, 492, 179 N.E.2d 497, 499 (N.Y. 1961)

result of the fraud. Such damages do not fully compensate the Plaintiffs, nor do they extract from the Defendant all of the fruits of its fraudulent scheme.

The district court and the court of appeals found that there was evidence which would place NAPB's potential profit from the fraud at $10 million. NAPB's fraudulent conduct was directed at all 35 Associates, yet only 13 sued and 10 went to trial[29]. The statute of limitations barred any other claims; hence, NAPB was exposed to verdicts for damages for only 10 of its 35 victims. Substantial punitive damages were required to extract the Defendant's profit and to cause NAPB to suffer a loss.

The exemplary damages award to St. Joseph Valley Seed Company was appropriate. Under Michigan law, exemplary damages may be awarded as compensation for loss where the damage inflicted upon the plaintiff was not susceptible to precise and definite measurement. Under Michigan law, lost profits are inherently incapable of precise measurement, as is damage for injury to reputation.[30] The district court's jury Instruction No. 54 clearly defines the purposes for exemplary damages under Michigan law. In reporting its verdict, the jury foreman specifically stated that Michigan law had been followed in making MFI's award. Pet. App. 32A n. 8. The purely economic damages awarded MFI are considerably less than the amount which the evidence would support. Exhibit 1339. There was evidence that MFI's business reputation was damaged. Tr. 3166, 3190, 3313-3315.

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[29] Obviously, none of the non-suing associates recovered any of their losses from NAPB. Substantial punitive damages were required to deny NAPB the benefit of this fraudulent gain.

[30] *Joba Construction Co. v. Burns & Roe, Inc.*, 329 N.W.2d 760 (Mich. Ct.App. 1982); *Hays-Albion v. Kuberski*, 311 N.W.2d 122 (Mich. Ct.App. 1981)

The jury followed Michigan law and the court's instructions[31] in awarding exemplary damages once fraud and malice were shown. The question of whether to award such damages and their amount were issues of fact for the jury to determine under the instructions.

Because the punitive damages were proportional to NAPB's wrongful conduct and the resulting harm, there is no basis for certiorari review on NAPB's fourth question.

CONCLUSION

The Petition for Certiorari is without merit. It rests on egregious distortions of the record and procedures below. The procedures recently approved in *Haslip* were strictly followed in this case. These punitive damage awards are consistent with procedural and substantive due process. Certiorari should be denied. That denial should not be delayed until the decision in *TXO*. No purpose would be served either by delay or by sending this case back to the Eighth Circuit.

Respectfully submitted,

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March 15, 1993

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[31] The court of appeals commented favorably upon the comprehensive instruction on Michigan's standards for exemplary damages. Pet. App. 16A n. 6.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 90-2486

Latham Seed Company; The Ohio Grain Company, f/d/b/a Ohio Soil Service, Inc.; Schettler Seed Farm, Inc., d/b/a Diamond Brand Seeds; Rupp Seeds, Inc.; Shockney Seed Service, Inc.; Diener Bros., Inc.; Charles O. Laverty, d/b/a Laverty Seed Farm; Coomer Seeds, Inc.; Settlemyre Seed Company; St. Joseph Valley Seed Co., d/b/a M.F.I. Seeds, Appellees,	*	Appeals from the United States District Court for the Northern District of Iowa.
v.		
Nickerson American Plant Breeders, Inc., d/b/a Agripro Seeds, Appellant.		

No. 90-2550

Latham Seed Company; The Ohio Grain Company, f/d/b/a Ohio Soil Service, Inc.; Schettler Seed Farm, Inc., d/b/a Diamond Brand Seeds; Rupp Seeds, Inc.; Shockney Seed Service, Inc.; Diener Bros., Inc.; Charles O. Laverty, d/b/a Laverty Seed Farm; Coomer Seeds, Inc.; Settlemyre Seed Company; St. Joseph Valley Seed Co., d/b/a M.F.I. Seeds, Appellants,	*	
v.		
Nickerson American Plant Breeders, Inc., d/b/a Agripro Seeds, Appellee.		

ORDER

Filed: June 21, 1991

Before LAY, Chief Judge, RONEY*, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

Without prejudice to either party as to this court's review on the merits relating to the liability issues, the court at this time remands this case to the district court to review the awards of punitive damages under the standards recently set forth by the Supreme Court of the United States. In *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S.Ct. 1032, 1045 (1991), the Supreme Court held that a court reviewing a jury's award of punitive damages may "ensure[] that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages" by considering certain objective standards including:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of

* The HONORABLE PAUL H. RONEY, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

> similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

The Court also indicated that a jury must not assess punitive damages solely on the basis of the defendant's net worth. *Id.* We conclude that the district court in the present case should consider whether, under applicable state law, the punitive damages are reasonable in light of the standards set forth in *Haslip*. *See Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991).

The district court should entertain briefs from the respective parties and, within a reasonable time, certify its findings back to this court. This court will hold final opinion on the merits until such time we receive the district court's certification.

A true copy.

Attest: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

LATHAM SEED COMPANY, Plaintiff, vs. NICKERSON AMERICAN PLANT BREEDERS, INC., d/b/a Agripro Seeds, Defendant.	)	CASE NO. C85-3114 SPECIAL VERDICT (Filed May 25, 1990)

We the jury, unanimously return the following answers:

PART I – BREACH OF CONTRACT

1. Do you find that plaintiff has proved any of its claims of breach of contract?

   ANSWER: "Yes" or "No" yes

If the answer is "yes," go on to question No. 1-a. If the answer is "no," go on to PART II.

1-a. Mark the blank next to each claim of breach of contract which plaintiff has proven defendant committed.

no A. Failed to provide best varieties in breach of contract.

yes B. Sold Agripro soybeans in direct competition in breach of contract.

yes C. Failed to disclose all relevant matters in breach of contract.

– D. Terminated plaintiff's contract in breach of an agreement that the contract was, or would be, renewed for an additional term beyond 1985.

PART II – FRAUDULENT MISREPRESENTATION

2. Do you find that plaintiff has proved any of its claims of fraudulent misrepresentation?

ANSWER: "Yes" or "No" yes

If the answer is "yes," go on to question No. 2-a. If the answer is "no," go on to PART III.

2-a. Mark the blank next to each claim of fraud which plaintiff has proven defendant committed.

no A. Fraudulently misrepresented that best varieties were, and would continue to be, marketed only through the associates.

no B. Fraudulently misrepresented that a plaintiff could not be terminated except for cause or by mutual consent, and that platintiff's [sic] marketing agreement would be automatically and continually renewed.

yes C. Fraudulently concealed its intention to terminate the associates and to market Agripro brand soybeans in competition with them.

– D. Fraudulently concealed its use of confidential information from the associates to prepare for direct sales in competition with the associates.

PART III – DAMAGES

Complete this part only if you have answered "yes" to *either* question No. 1 in Part I or question No. 2 in Part II. If your answers to both of these questions were "no," do not answer this Part but proceed to answer Part V.

"We, the Jury, fix the amount of plaintiff's compensatory damages in the amount of $475,776.00."

PART IV – PUNITIVE DAMAGES

Complete this part only if you have answered "yes" to question 2 in PART II. If your answer to question 2 in PART II was "no," do not answer this question, but proceed to Part V.

3. Do you find that plaintiff is entitled to punitive damages in this case?

   ANSWER: "Yes" or "No" yes

   If your answer is "yes" complete the following question.

"We, the Jury, fix the amount of plaintiff's punitive damages in the amount of $1,000,000.00." One million dollars

PART V – NAPB'S COUNTERCLAIM

4. Do you find that NAPB has proved its counterclaim against plaintiff?

   ANSWER: "Yes" or "No" no

   If your answer is "yes" complete the following question.

"WE, the Jury, fix the amount of NAPB's recovery on its counterclaim in the amount of $0.00."

/s/ Brian K. Knudtson
FOREPERSON

5/25/90
DATE

INSTRUCTION NO. 47

The remedy, or measure of damages, for breach of contract is known as "benefit of the bargain." In other words, the injured party is entitled to the amount of damages that will place it in the position it would have been in if the contract had been fully performed. Similarly, the remedy, or measure of damages, for fraud is "benefit of the bargain." If you determine, through application of prior instructions, that a party made a fraudulent misrepresentation to another party, causing injury, the injured party is entitled to what it would have received if the representation had been fulfilled.

Thus, should you find that any party has established one or more claims of breach of contract or of fraudulent misrepresentation, it will be your duty to determine the amount of money necessary to put the party in such place as it would have been if the contract had been fully performed and if any such fraudulent misrepresentation, or misrepresentations, had been fulfilled.

Although the basic measure of damages is the same in this case for both theories of recovery, there are some significant differences between damages awardable for breach of contract and damages awardable for fraudulent misrepresentation. Those differences, and further instruction on how to calculate "benefit of the bargain damages," are laid out in the following instructions. If an instruction does not limit itself to a specific form of damages, or to damages for just one of the two theories of recovery, you shall consider it with regard to all damage claims.

Benefit of the bargain damages are compensatory in nature.

INSTRUCTION NO. 48

In the present case, plaintiffs seek the following compensatory damages as part of their benefit of the bargain:

A. Damages equal to the amount of lost profits that plaintiffs claim they lost as a result of defendant not providing them with the best varieties it was producing.

B. Damages equal to the amount of lost profits that plaintiffs claim they lost as a result of defendant's going into direct competition with them.

C. Damages equal to the amount of lost profits that plaintiffs claim they lost as a result of defendant's termination of their contracts.

In the present case, defendant seeks the following compensatory damages as part of its benefit of the bargain:

A. Damages equal to the royalties plaintiffs never paid for their sales of soybeans in the 1984-85 and the 1985-86 sales year.

As already indicated, a party is only entitled to recover damages to the extent that such damages would have been part of its bargain if no contract breach or fraud had occurred. For example, a plaintiff can only recover damages for lost profits related to "best varieties" if it establishes: (1) that defendant either contractually

agreed or fraudulently misrepresented that it would provide plaintiff with its "best varieties"; and (2) that defendant failed to fulfill any such promise. Should you find such an award appropriate, you will then need to determine the period of time for which such plaintiff bargained for the benefit of such varieties.

INSTRUCTION NO. 54

In addition to compensatory damages, each plaintiff also seeks to recover what is known in the law as exemplary or punitive damages. The law permits, but does not require, a jury to allow exemplary damages in proper and specified instances. Thus, if you find, in accordance with this instruction and the evidence, that all the prerequisites for an award of exemplary damages are present, the decision on whether or not to award punitive damages will be exclusively within your province.

Although the law on exemplary damages is not the same for all plaintiffs, each plaintiff does have to establish each of the following before it can be awarded punitive damages:

1. That the plaintiff is entitled to a verdict for actual or compensatory damages. The award of only a nominal sum for compensatory damages should not, however, prevent you from awarding punitive damages if you find that an award of such damages is justified under these instructions;

2. That the act or omission of the defendant which proximately caused the actual injury

or damage to the plaintiff was reckless, wanton or malicious. The malice required to justify the award of punitive damages may be satisfied by either "actual malice" or "legal malice." Actual malice means spite, hatred, or ill-will. Legal malice means wrongful and illegal conduct committed or continued with a willful or reckless disregard of another's rights. It has been defined as the intentional of a wrongful act without just cause or excuse.

3. That the defendant committed fraud. Punitive damages may not be awarded for breach of contract without fraud.

Because of differences in state law the standard of proof for establishing these propositions is not the same for all of the plaintiffs. The standard of proof for Latham Seed Company, Schettler Seed Farm, Inc., Shockney Seed Service, Inc., Diener Brothers, Inc., Charles O. Laverty and Coomer Seeds. Inc., is by a preponderance of clear, convincing and satisfactory evidence as that standard was previously explained to you. The burden of proof with regard to the other plaintiffs is the ordinary "preponderance of the evidence" standard.

There is one other difference in the law applicable to the various plaintiffs which you must keep in mind. Punitive or exemplary damages are generally not compensatory in the ordinary sense, but are instead allowed by way of punishment against a party who has acted maliciously in order to restrain and deter the party, and others, from committing similar acts in the future. In this case, this is the law with regard to nine of the plaintiffs.

Such is not the law, however, with regard to St. Joseph Valley Seed Co., d/b/a M.F.I. Seeds. With regard to this plaintiff, exemplary damages are not to be awarded as punishment of defendant. Instead, you may award such damages only to compensate for injuries not capable of precise computation which are a result of malicious conduct by the defendant and have not otherwise been compensated for. An example of such an injury, in an appropriate case, would be damage to business reputation. If you find that, in addition to the criteria listed above, St. Joseph Valley Seed Co. has shown that such damages are necessary to fully compensate it for injuries it suffered as a result of malicious conduct by defendant, you may award such exemplary damages as you find necessary to reasonably, fairly and adequately compensate plaintiff for injuries caused by such conduct which it has not otherwise been compensated for.

In determining the amount of exemplary damages, if any, which you find should be awarded to the other plaintiffs, you may consider evidence of:

1. The opposing party's conduct;

2. The amount of punitive damages which will punish and discourage like conduct by the opposing party in view of its financial condition (in considering this criteria you may only consider the financial condition of defendant NAPB and not the condition of any other company you have heard mentioned in the trial); and

3. The party's actual damages.

In determining any award of punitive damages, with regard to all plaintiffs, you should bear in mind not only

the conditions under which, and the purposes for which, the law permits an award of punitive damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded must be fixed with calm discretion and sound reason and must never be either awarded or affixed in amount because of any sympathy, bias or prejudice with respect to any party to the case.

Finally, you are instructed that evidence of malice is rarely direct. Therefore you should consider all of the circumstances of this case as disclosed by the evidence in determining whether or not to award punitive damages to any of the parties.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA CENTRAL DIVISION

LATHAM SEED COMPANY, et al., Plaintiffs, vs. NICKERSON AMERICAN PLANT BREEDERS, INC., d/b/a Agripro Seeds, Defendant.	CIVIL NO. C85-3114 ORDER (Filed July 10, 1991)

This matter is before the Court on limited remand by the Eighth Circuit Court of Appeals to consider the constitutionality of the award of punitive damages in this

case under *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S.Ct. 1032, 1045 (1991).

The parties shall address this issue in simultaneous briefs to be filed with the Court on July 29th 1991. The Court will entertain oral arguments on the issue on August 6th, 1991 at 10:00 o'clock at the U.S. Courthouse in **DES MOINES, IOWA.**

IT IS SO ORDERED.

Dated this 5th day of July, 1991.

/s/ William C. Hanson
WILLIAM C. HANSON,
Judge
U.S. DISTRICT COURT

Copies mailed on JUL 10 1991
to counsel of record or pro se
parties as shown on the docket
sheet.
/s/ M. Jebb
Deputy Clerk

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 90-2486/2550NI

Latham Seed Co., et al. Appellants,	*	Appeal from the United States District Court for the Northern District of Iowa
vs.	*	
Nickerson American Plant Breeders, Inc., etc., Appellee.	*	

The court has requested that the parties file simultaneous briefs within fifteen days not to exceed fifteen (15) pages in length setting forth their respective positions concerning the district court's supplemental findings and conclusions on the punitive damages issue as set forth in its order of September 27, 1991. Your prompt cooperation with the court's request would be appreciated.

October 15, 1991

Order entered at the direction of the Court.

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.